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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-664

VENTURA COUNTY,

Appellant,

v.

GULF OIL CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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October Term, 1979

No. _____

VENTURA COUNTY,

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v.

GULF OIL CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant, Ventura County, appeals from the final judgment of the United States Court of Appeals for the Ninth Circuit, dated August 3, 1979, that Ventura County's zoning ordinances are preempted by federal law and cannot be

applied to the appellee, Gulf Oil Corporation, as the lessee of federally-owned national forest lands located within Ventura County, California.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, which appears in the appendix hereto, p. A-1, is reported at __ F.2d __.

The order of the United States District Court for the Central District of California, dated April 7, 1977, which was affirmed by the opinion of the Court of Appeals, is not reported. It is reprinted in the appendix hereto, p. A-21.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, holding that Ventura County's zoning ordinances are preempted by federal law, was entered on August 3, 1979. [P. A-1, App.]

A notice of appeal to this Court was duly docketed in the United States

Court of Appeals for the Ninth Circuit on August 30, 1979. [P. A-44, App.] This appeal is being docketed in this Court within 90 days from the entry of the judgment below.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).[1/]

Questions Presented

1. Whether private entrepreneurs using federally-owned lands with federal permission are exempt from observing the requirements of local zoning ordinances.

1a. Whether Congress <u>can</u> preempt and clearly <u>has</u> preempted local governments' historic police power of zoning lands within their boundaries through its enactment of legislation authorizing the establishment of national forests and the leasing of federally-owned lands

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1/ "For the purposes of §1254(2), local ordinances are treated as state statutes." <u>Doran v. Salem Inn, Inc.</u> (1975) 422 U.S. 922, 927, fn.2.

therein to private parties for mineral development.[2/]

Constitutional and Statutory Provisions

The following constitutional and statutory provisions which are involved

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2/ The lower court has characterized the first part of this question (i.e., whether Congress can preempt under its Property Clause powers) as "frivolous" in light of the decision rendered in Kleppe v. New Mexico (1976) 426 U.S. 529 while this case was pending in the District Court. [P. A-7, App.] Assuming, arguendo, that the question of preemptive capability (vs. preemptive intent) could properly be considered closed despite the existence of strong criticism by recognized constitutional scholars and suggestions that the broad language of Kleppe be reexamined and limited by this Court (see, e.g., Engdahl, State and Federal Power Over Federal Property (1976) 18 ARIZ. L. REV. 283, 349-358 and 369-370), this Court obviously has the option of confining its review of the present case to the undeniably substantial questions of preemptive intent discussed hereinbelow should it choose to do so. Zicarelli v. New Jersey State Commission of Investigation (1971) 401 U.S. 933.

in this case are set forth beginning at p. A-46, App.:

U.S. CONST. art. IV, § 3, cl. 2

U.S. CONST. art. VI, cl. 2

16 U.S.C. § 480

16 U.S.C. § 551a

30 U.S.C. § 187

30 U.S.C. § 189

VENTURA COUNTY ORDINANCE CODE § 12

VENTURA COUNTY ORDINANCE CODE, DIV. 8, CHAP. 1,

ART. 1 (partial)

ART. 25 (partial)

ART. 43 (partial)

STATEMENT OF THE CASE

This is a suit brought by appellant Ventura County, California, ("Ventura County" hereinafter) against appellee Gulf Oil Corporation ("Gulf" hereinafter) to enforce the O-S (Open Space) zoning provisions of the Ventura County Ordinance Code on a parcel of federally-owned land. In this suit, Ventura

County has sought a declaration that land use activities conducted by private, nongovernmental individuals and organizations on federally-owned lands within the Los Padres National Forest in Ventura County must be conducted in compliance with the County's zoning ordinances. The County has also sought to enjoin Gulf from engaging in oil exploration and extraction activities on such lands until Gulf has requested and obtained an Open Space Use Permit for its activities in compliance with one of the requirements of such zoning provisions.

For many years, Ventura County has routinely sought and obtained compliance with its zoning ordinances by private parties engaging in land use activities on federally-owned lands within the Los Padres National Forest, and has issued numerous use permits specifically for oil exploration and extraction by private operators on federally-owned lands within this national forest. [PP. A-62 through A-72, App.]

Ventura County's zoning ordinances expressly permit "oil exploration and

extraction" activities on O-S (Open Space) zoned land following the formulation of conditions to protect adjacent properties and approval of an Open Space Use Permit by the Ventura County Planning Commission. The stated purpose of Ventura County's zoning ordinances is, inter alia, "to protect and promote the public health, safety, morals and welfare, and to provide the economic and social advantages which result from an orderly, planned use of land resources." [P. A-50, App.]

In 1974, the Bureau of Land Management of the United States Department of the Interior granted a lease of an O-S zoned 120 acre parcel located within the Los Padres National Forest to a private individual for purposes of oil exploration and development. The lease was subsequently assigned to Gulf. In early 1976, Gulf obtained the authorization of various federal agencies to drill on the leased lands, and commenced operations on

April 28, 1976.[3] Although advised by Ventura County that it must obtain an O-S Use Permit and comply with the conditions of the County's zoning ordinances in order to conduct drilling operations, Gulf refused to do so.

The Gulf drillsite is located just within (approximately 1200 feet inside the boundary of) the Los Padres National Forest. Numerous occupied private residences are located on private lands in the vicinity of the drillsite at distances ranging from approximately 1,000 feet to 7,000 feet from the Gulf drillsite.

The property upon which Gulf is drilling is land over which the federal government claims only a

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3/ The federal permissions which were granted enable, but do not require, Gulf to drill upon the subject federal lands. Like all lessees under the Mineral Lands Leasing Act [of 1920] (30 U.S.C. §§ 181 et seq.), Gulf enjoys the unfettered discretion "at any time [to] make and file in the appropriate land office a written relinquishment of all rights under . . . [its] lease . . . [which] relinquishment shall be effective as of the date of its filing . . . ." 30 U.S.C. § 187b.

proprietorial interest.[4]

On May 20, 1976, Ventura County brought suit in the California Superior Court seeking a declaratory judgment (that Gulf's activities are subject to Ventura County's zoning ordinances) and injunctive relief. The case was removed to the United States District Court following Gulf's invocation of diversity of citizenship jurisdiction under 28 U.S.C. § 1332, Ventura County being a California county and Gulf being a Pennsylvania corporation.

4/ Traditionally, the extent of federal jurisdiction over particular lands owned by the United States has been described by use of the following four terms: Exclusive legislative jurisdiction; concurrent legislative jurisdiction; partial legislative jurisdiction; proprietorial interest only. This last term ("proprietorial interest only") is "applied to those instances wherein the Federal Government has acquired some right or title to an area in a State but has not obtained any measure of the State's authority over the area." INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION, 7 (U.S. Govt. Printing Office 1957).

Ventura County's request for declaratory and injunctive relief was tried in the District Court upon a stipulated statement of facts (which provided, inter alia, for the Court's consideration in evidence of the affidavits reprinted at pp. A-62 through A-72, App.). No evidence was presented to show that Ventura County has ever refused to issue a use permit to a private individual or organization for oil and gas exploration on federally-owned lands within the national forest or has ever conditioned any of the numerous use permits which it has issued to such operations in the past so as to interfere with any federal activities or programs.

The District Court denied the relief requested by Ventura County without commenting on the undisputed history of successful application of the County's ordinances to private lessees of national forest lands. Although noting that California retains civil and criminal jurisdiction over lands within the Los Padres National Forest notwithstanding the fact that such lands may be owned by the federal government, the District

Court determined that "the County's [zoning] ordinances cannot constitutionally be applied" to Gulf due to an implied Congressional preemption of such ordinances through enactment of the Mineral Lands Leasing Act [of 1920], 30 U.S.C. §§ 181 et seq. (The District Court did not comment upon the legislative history of Congressional debates which had preceded passage of this Act. This history had been cited by Ventura County to demonstrate that Congress had no implicit or explicit intention to eliminate historic local police powers such as zoning by this enactment.)[5/]

Also without comment upon the past record of successful application of Ventura County's zoning ordinances within the national forest or the history of Congressional debate which preceded enactment of the Mineral Lands Leasing Act, the Court of Appeals affirmed the District Court, holding that Ventura

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5/ See House debates, 58 Cong. Rec. (Oct. 28, 1919) at pp. 7642 et seq.

County's "local ordinances . . . cannot be applied to Gulf." [P. A-7, App.)6/

6/ In its Reply Brief (p. 5) and in oral argument, Ventura County had urged that "[e]ndorsement of Gulf's arguments should have prompted, at most, a ruling that Gulf need not acquire a County permit, but that it is nonetheless subject to the local ordinance insofar as the ordinance sets forth general conditions of operation which must be observed by all oil companies in the County [in order to protect the health, safety and welfare of citizens on adjacent properties] (see Ventura County Ordinance Code §8163-14-§8163-14.11 . . .). Total elimination, not just of the power to require a conditional use permit, but of all regulatory jurisdiction, was clearly unwarranted." (Emphasis added.) The Court of Appeals makes no reference to this point in its opinion which broadly bars application of the County's zoning ordinances in their entirety.

THE QUESTIONS ARE SUBSTANTIAL

I

THIS CASE PRESENTS SIGNIFICANT ISSUES OF BROAD NATIONAL INTEREST AND EFFECT.

The question of the applicability of local zoning ordinances to private entrepreneurial activities on leased national forest lands is a novel and substantial one.7/ It has never been treated before by this Court.

Of the approximately 765 million acres (33.5% of the nation's land base) owned by the United States, the great majority (728 million acres--95%), including all national forests, are held by the federal government in a "proprietorial"8/ capacity only. Thus, aside from its impacts upon national forest lands (which are of themselves

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7/ As the District Court accurately observed, the zoning jurisdiction issue presented in this case "appears to be one of first impression." [P. A-35, App.]

8/ See fn. 4, supra, p. 9.

substantial),[9] this case will have significant implications for the future of federal-state relations in an area comprising almost one-third of this nation's total land mass.

A local jurisdiction's exercise of its historic police power of zoning in order to protect the "quality of life" of its citizens has been aptly described as perhaps "the most essential function performed by local government." (Dissenting opinion of Justice Marshall in

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9/ The nationwide significance of any decision regarding the extent of local zoning jurisdiction upon national forest lands alone becomes apparent when it is noted that there are approximately 187 million acres of federally-owned national forest lands (roughly one-fourth of all federal lands) scattered throughout 41 of the 50 states. See PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (U.S. Govt. Printing Office 1970) at p. 324 and pp. 327-330. Some 155 national forest reservations have been established throughout the United States, ranging from the Los Padres National Forest in California (which encompasses within its 1,965,000 acre expanse approximately one-half of the total 1.2 million acres of Ventura County's land base) to the Monongahela National Forest in West Virginia's Appalachian Mountains.

Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 13.) The broad effects of the lower court's decision in this case, which is to simply discard such essential local police powers indiscriminately,[10] should not be allowed to stand absent a full and deliberate consideration of the issues presented by the Supreme Court of this land.[11]

10/ See fn. 6, supra, p. 12.

11/ In apparent reaction to a perceived federal insensitivity to local interests in the use of federally-owned lands, the State of Nevada last June initiated a widely publicized "sagebrush rebellion" through enactment of legislation claiming state title to 49 million acres of Nevada territory owned by the federal government. (See, e.g., newspaper accounts in New York Times, June 10, 1979, § 1, p. 50 ("Nevada Trying to Reclaim Land Held by Government Since 1864"), Reno Evening Gazette, July 30, 1979, p. 7 ("10 states endorse 'Sagebrush Rebellion'") and Los Angeles Times, September 7, 1979, p. 6 ("Western Officials Devise Strategy to Get U.S. Land"). Also see cover story ("The Angry West") and article ("Sagebrush Revolt") at pp. 38-39, NEWSWEEK, Sept. 17, 1979.) This Court's full

As a possible vehicle for clarification of the extent of local zoning powers on leased federal lands and resolution of the delicate issues which arise in accommodating federal and state interests in such areas, this case has already generated a significant amount of national interest. Indicative of such interest and the national importance of the issues involved are the facts that

**the case has been selected as the focus of discussion of a national panel presentation on "Local Regulation of Private Uses on Federal Lands" by the American Bar

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11/ (Continued)

consideration of the broad implications of the Gulf decision at this time, and reaffirmation of its earlier decisions refusing to find preemption of traditional local police powers on federal lands absent unequivocal evidence of Congressional intent to preempt, may go far to lessen the concerns prompting such incipient "rebellions."

Association and the American Law Institute,12/

**the case will be extensively treated (and criticized) in a note on the subject of local controls over energy development on federal lands currently scheduled for publication between November, 1979, and February, 1980, in Volume 32 of the Stanford Law Review,13/ and

**even the unreported decision of the District Court in this case was immediately seized and brought to national attention through citation and discussion (albeit inaccurate) by state courts

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12/ Presented at the fourth annual ALI-ABA Course of Study on "Land Use Litigation: Critical Issues for Attorneys, Developers and Public Officials" in October, 1979, in Philadelphia, Pennsylvania. See ALI-ABA CLE REVIEW, VOL. 10, NO. 29 (JULY 20, 1979).

13/ The preliminary draft and tentative publication date of this article have been provided to Ventura County by the Editorial Offices of the Stanford Law Review, Stanford University, California.

groping for guidance in accommodating the concepts of local regulatory powers over private parties with public land ownership.[14/]

II

THE DECISION BELOW IS INCORRECT.

It is, of course, not just the recognized national interest and impacts but also the obvious errors and omissions of the lower court's opinion which warrant a full briefing and consideration of the issues in this Court in order to serve "the policy underlying [28 U.S.C.] § 1254(2) [of] ensuring that state laws are not erroneously invalidated . . . ."[15/] Such errors and

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14/ See, e.g., inaccurate summary of Gulf case in State ex rel. Cox v. Hibbard, (Ore. Ct. App. 1977) 570 P.2d 1190, 1195. Also note reference to pendency of Gulf case following criticism of Kleppe v. New Mexico (1976) 426 U.S. 529 in Engdahl, Some Observations on State and Federal Control of Natural Resources (1978) 15 HOUSTON L. REV. 1201, 1211.

15/ City of New Orleans v. Dukes (1976) 427 U.S. 297, 302.

omissions, which can be discussed only briefly herein, demonstrate the obvious desirability of further consideration before the Gulf decision can be allowed to stand as precedent on the subject of local zoning authority over private lessees of federally-owned lands.

This Court has long emphasized the necessity for judicial restraint in finding federal preemption of traditional local police powers absent a clear and unequivocal manifestation of Congressional preemptive intent.[16/] Yet the lower court has found an implied preemption of the historic local police power of zoning as to private lessees of federally-owned national forest lands despite explicit Congressional disavowal of any preemptive intent in

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16/ Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230. Also see New York State Department of Social Services v. Dublino (1973) 413 U.S. 405; Huron Portland Cement Co. v. Detroit (1960) 362 U.S. 440; Schwartz v. Texas (1952) 344 U.S. 199, 202-203; Penn Dairies v. Milk Control Commission (1943) 318 U.S. 261; Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd. (1942) 315 U.S. 740.

both the national forest legislation (16 U.S.C. §§ 471 et seq.) and the Mineral Lands Leasing Act [of 1920] (30 U.S.C. §§ 181 et seq.).[17/] Moreover, although this Court has stressed that preemption inquiries require consideration of the relationship between state and federal laws "not merely as they are written" but "as they are interpreted and applied,"[18/] the lower court has completely neglected to consider the undisputed history of past successful application of the very zoning ordinances at issue in this case to private lessees of federally-owned national forest lands.[19/] How the lower court is able to find the existence of an "impermissibl[e] conflict" between the local

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17/ See 16 U.S.C. § 480 and 30 U.S.C. § 189 [pp. A-47 and A-49, App.] and this Court's earlier recognition of the non-preemptive intent of such sections in Wilson v. Cook (1946) 327 U.S. 474 and Mid-Northern Oil Co. v. Montana (1925) 268 U.S. 45, respectively.

18/ Jones v. Rath Packing Co. (1977) 430 U.S. 519, 526.

19/ See portion of record reprinted at pp. A-62 through A-72, App.

ordinances and the Mineral Lands Leasing Act [of 1920][20/] when the only record before it was one of past application of the ordinances without the creation of any such conflict is left to surmise.

What is clear is that the lower court has determined that local zoning jursidiction has been impliedly preempted by enactment of the Mineral Lands Leasing Act [of 1920]. To this extent, the opinion below completely overlooks, and conflicts with, this Court's earlier decision in Mid-Northern Oil Co. v. Montana (1925) 268 U.S. 45, that Congress has expressly consented in 30 U.S.C. § 189 to the states' continued exercise of their rights on lands leased under the Mineral Lands Leasing Act [of 1920.][21/]

20/ Opinion below at p. A-7, App.

21/ The lower court's decision is also contrary to the theme of numerous other federal court decisions recognizing that there is no compelling reason to immunize from local jurisdiction those private individuals and corporations which may choose to harvest natural resources on federal lands (Oklahoma Tax Commission v. Texas Co. (1949) 336 U.S.

Regarding the savings provisions of 30 U.S.C. § 189 directing that the Mineral Lands Leasing Act not be "construed or held to affect the rights of the States or other local authority to exercise any rights which they may have," the lower court has dismissed this proviso with the cryptic observation that it "cannot give authority to the state which it does not already possess." [P. A-15, App.] If this observation is meant to suggest that local governments did not already possess traditional police powers of zoning prior to enactment of the Mineral Lands Leasing Act

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21/ (Continued)

342; Wilson v. Cook (1946) 327 U.S. 474; International Paper Co. v. County of Siskiyou (9th Cir. 1974) 515 F.2d 285) and of various state court decisions that the mere status of being a lessee of either federal or state lands does not allow one to disregard local building and zoning regulations (Dupuis v. Submarine Base Credit Union, Inc. (Conn. 1976) 365 A.2d 1093; Youngstown Cart. Co. v. North Point Peninsula, Etc. (Md. Ct. App. 1975) 332 A.2d 718; People v. Vendome Service, Inc. (N.Y. Ct. App. 1940) 31 N.E.2d 508).

[of 1920], it is clearly in error.22/ On the other hand, if the court's observation is meant to imply that Congress did not intend by enactment of § 189 to allow the exercise of any state or local power, no matter how venerable, which might "interfere" with private uses of federal lands, it is in direct (and inexplicable) conflict with the legislative history of § 189--a history which was cited to, but never even commented upon by, the court below.23/

22/ The right of local governments to enact and enforce zoning laws within their boundaries is one which, as recognized by this Court in Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 386, has been exercised at least since the turn of the century.

23/ With reasoning which is virtually identical to that contained in the lower court's conclusion that Ventura County cannot be allowed to apply its local ordinances, Congressional opponents of the Mineral Lands Leasing Act proviso saving local jurisdiction had argued that the proviso (§ 189) could "mak[e] it impossible for the Federal Government to do business respecting its own land with those with whom it has chosen to do business. . . . The States should not be permitted to enact laws that will embarrass the Government in its own use of

The decision below apparently rests upon two basic premises: (1) That the existence of extensive regulations issued by federal administrative agencies to govern the conduct of federal lessees supports a finding of implied preemption through enactment of the Mineral Lands Leasing Act [of 1920], and (2) that the requirement that Gulf obtain a county conditional use permit impermissibly creates "a local veto power" [p. A-16,

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23/ (Continued)

its property or that will interfere with private parties to whom it grants rights or privileges." [Representative McLaughlin, 58 Cong. Rec. (Oct. 28, 1919) at p. 7647.] Yet, in the face of this express invitation to preempt local regulatory authority over private lessees on federally-owned lands, the House of Representatives refused by a majority vote of approximately 80 percent to delete the subject proviso when debating enactment of the Mineral Lands Leasing Act [of 1920]. [58 Cong. Rec. (Oct. 28, 1919) at p. 7647.] Discussion of such legislative history (which can hardly be said to support the conclusion that local zoning jurisdiction has been preempted through enactment of the Mineral Lands Leasing Act) is conspicuously absent from the opinion below.

App.] and must, therefore, eliminate the applicability of Ventura County's zoning ordinances in their entirety.

As to the first of these premises, it must be noted that no action of federal administrative agencies, no matter how "extensive," can supply a missing Congressional intent to preempt. In the very same section in which it authorized the issuance of administrative regulations, Congress specifically provided that nothing in the Mineral Lands Leasing Act "shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have" (30 U.S.C. § 189), and no regulations issued by administrative agencies may be contrary to this provision or broaden the effect of the Act.24/

As to the second of these premises, it ignores the undisputed historical fact that the local ordinances have

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24/ West v. United States (D.C. Cir. 1929) 30 F.2d 739, 740; Texas Oil & Gas Corp. v. Phillips Petroleum Co. (W.D. Okla. 1967) 277 F.Supp. 366, 370, aff'd (10th Cir. 1969) 406 F.2d 1303, cert. den. (1969) 396 U.S. 829.

never been applied in past decades so as to "veto"[25] any federally approved activities and it fails to suggest or demonstrate why all portions of the zoning ordinance must fall simply because one requirement (permit issuance) cannot be tolerated. Why, for example, must the local ordinance provisions

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25/ The lower court's endorsement of the "catch 22" reasoning that, even though its ordinances allow oil drilling, the County is seeking to exercise a veto power when it requests injunctive relief against one who chooses to ignore those ordinances [p. A-11, App.] leaves the County in a completely helpless posture, and has led to a premature preemption decision. "[C]onflict is the touchstone of pre-emption." San Diego Building Trades Council, Etc. v. Garmon (1959) 359 U.S. 236, 250 (concurring opinion of Justice Harlan). Unless and until Gulf has applied for, and been denied, a County use permit, it is both unnecessary and premature to purport to find any ouster of local jurisdiction. (Note, e.g., the court's wise refusal to be drawn into a premature preemption decision by speculation as to whether a state permit (which had not been sought) "might" later be denied in State ex rel. Andrus v. Click (Ida. 1976) 554 P.2d 969, 975 fn. 3.)

which require noise reduction devices on all oil drilling rigs within 500 feet of private residences [§ 8163-14.1, p. A-55, App.] and the fencing of waste sumps [§ 8163-14.5, p. A-57, App.] not be applicable to those drilling on federal lands adjacent to private residences?

Although the opinion below relies upon the existence of "extensive" federal regulations to show that there has been an implied preemption, one searches in vain in such opinion for citation of any particular federal regulations which are allegedly in direct and irreconcilable conflict with any particular Ventura County zoning ordinance requirements. In fact, it is clear in the record below that the intent of the federal administrative regulations referenced by the lower court is merely to control the conduct of particular drilling operations and subsequent cleanup procedures so as to protect and restore those portions of the national forest which are used for such operations. There is no mention of, or protective federal regulation regarding, the effects of noise, dust,

odor, traffic, attractive nuisances and other incidents of drilling upon the numerous occupied private residences located in the vicinity of the Gulf drillsite. Such concerns are only addressed by Ventura County's zoning ordinances which are designed, inter alia, "[t]o assure . . . compatibility of . . . the particular use . . . [with other] uses of property within the zone and the general area," and to "assure that the use will not be or become detrimental to the public interest, health, safety, convenience, or the general welfare." [§§ 8163-3.1 et seq., p. A-54, App.]

The different points of emphasis of these federal and county regulations (the former being concerned with protection of the land per se and the latter being concerned with protection of citizens and other land uses in the vicinity) serve to indicate why there has not been in the past, and need not be in the future, any "conflict" through application of Ventura County's zoning

ordinances to private entrepreneurs engaged in operations on federal lands. They also indicate, however, the distressing situation which has been created by the lower court's determination that local zoning jursidiction is preempted in this case. For it is clear that the federal mineral leasing legislation does not concern itself with the protection of other citizens and land uses in the vicinity of drilling sites; if the County cannot do so, such protection is completely lacking.[26/]

26/ The lower court's assurance that the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 et seq.) mandates consideration of local impacts [p. A-15, App.] provides little solace. Although NEPA can ensure that a report is prepared regarding environmental impacts of the proposed activity, the conditions which are imposed upon the activity under the Mineral Lands Leasing Act are neither designed nor intended to lessen whatever impacts there may be on adjacent private lands and landowners, but are merely directed toward preservation of the particular piece of federal land being used. A report detailing the environmental impacts adjacent private lands will suffer is meaningless in the absence of conditions designed to mitigate such impacts--conditions which have

CONCLUSION

As noted above, the specific reservations of local jurisdiction in, and the explicit legislative history of the debates preceding, the Congressional enactments involved in this case must, at the very least, raise serious doubts as to whether Congress could be said to have intended to override local zoning jurisdiction upon the 187 million acres of national forests which have been established throughout the United States and upon the additional millions of acres of federal lands which are available for private use under the

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26/ (continued)

heretofore been fashioned and enforced through application of the County's zoning ordinances. (The lower court's casual reference to NEPA as ameliorating its conclusion that local controls have been preempted becomes doubly ironic when it is noted that Congress has expressly directed that the "primary responsibility for implementing" the environmental protection policy expressed therein "rests with State and local governments." 42 U.S.C. § 4371(b)(2).)

Mineral Lands Leasing Act. In its willingness to resolve any and all such doubts in favor of nullification of traditional and essential local police powers of zoning, the opinion below disregards legislative language, local history and judicial precedent.

The unfortunate decision which has been rendered below will have significant consequences for federal-state relationships in an area encompassing almost one-third of this nation's land mass. The nationwide interest already generated by this case during its passage through the courts below [see pp. 16-18, supra] and the opportunity which it presents for clarification of crucial constitutional issues in the presently turbulent area of intergovernmental relations on federally-owned lands [see p. 15, fn. 11, supra] cogently demonstrate the need for this Court's plenary review and guidance.

For the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Supreme Court, U. S.
FILED
OCT 24 1979
MICHAEL RODAK, JR., CLERK

A P P E N D I X

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-664

VENTURA COUNTY,

Appellant,

v.

GULF OIL CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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F I L E D

AUG 3 1979

EMIL E. MELFI, JR., CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VENTURA COUNTY, Appellant,	)	No. 77-2319
v.	)	No. 77-2716
GULF OIL CORPORATION, Appellee.	)	OPINION

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and CALLISTER,* District Judge

HUFSTEDLER, Circuit Judge:

The question on appeal is whether the County of Ventura ("Ventura") can require the federal Government's lessee,

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* Honorable Marion J. Callister, United States District Judge, District of Idaho, sitting by designation.

Gulf Oil Corporation ("Gulf"), to obtain a permit from Ventura in compliance with Ventura's zoning ordinances governing oil exploration and extraction activities before Gulf can exercise its rights under the lease and drilling permits acquired from the Government. The district court denied Ventura's motion for a preliminary injunction, and dismissed Ventura's second amended complaint. Ventura appeals. We uphold the district court because the local ordinances impermissibly conflict with congressional regulation of Gulf's activities on government land.

On January 1, 1974, the Department of the Interior, Bureau of Land Management, pursuant to the Mineral Lands Leasing Act of 1920 (30 U.S.C. §§ 181 et seq.), leased 120 acres located within the Los Padres National Forest in Ventura for purposes of oil exploration and development. A subsequent assignment of this lease to Gulf was approved by the Department of the Interior, effective April 1, 1974. On February 25, 1976, the United States Department of the Interior, Geological

Survey, issued a permit approving Gulf's proposal to drill an oil well pursuant to its lease. On March 8, 1976, and April 15, 1976, the United States Department of Agriculture, Forest Service, also granted its permission, and on March 8, 1976, the California Resources Agency, Division of Oil and Gas, approved the proposed exploration. After drilling operations were commenced on April 28, 1976, Gulf pursued activities related to oil exploration and extraction on the leased property, and it intends to continue development of both its present and other drill sites.

Throughout this period the leased property has been zoned Open Space ("O-S") by Ventura. Under its zoning ordinance, oil exploration and extraction activities are prohibited on O-S property unless an Open Space Use Permit is obtained from the Ventura County Planning Commission in accordance with Articles 25 and 43 of the Ventura County Ordinance Code. The O-S Use Permits are granted for such time and upon such conditions as the Planning Commission

considers in the public interest. The permits contain 11 mandatory conditions and additional conditions are committed to the Planning Board's discretion.

On May 5, 1976, Ventura advised Gulf that it must obtain an O-S Use Permit if it wished to continue its drilling operations. Gulf refused to comply, and on May 20, 1976, Ventura brought suit in the California Superior Court seeking a declaratory judgment that Gulf's activities are subject to Ventura's zoning ordinances. The case was removed to the district court. Following the filing of its second amended complaint, Ventura moved for a preliminary injunction with respect to the first two counts of its second amended complaint, and Gulf moved to dismiss the complaint. The trial on the merits was consolidated with the hearing on Gulf's motions. After denying the injunction, the district court finally dismissed the action.[1/]

Ventura contends that the district court erred in concluding that the Supremacy Clause of the Constitution

precludes enforcement of the zoning ordinances against Gulf both because Congress lacked the power to preempt local regulation and because, even assuming Congress had such power, its enactments provide no basis for finding preemption, either express or implied.

Although Ventura and amicus argue extensively that congressional enactments under the Property Clause[2/] generally possess no preemptive capability, we believe that Kleppe v. New Mexico (1976) 426 U.S. 529, is dispositive. In Kleppe, New Mexico authorities entered federal lands and rounded up 19 wild burros pursuant to the New Mexico Estray Law, N.M. Stat. Ann. § 47-14-1 et seq. (1966). The Bureau of Land Management demanded the return of the burros under the Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, which was passed in 1971 to protect wild horses and burros on the public lands of the United States. The New Mexico authorities refused to comply and sought a declaratory judgment that the act was unconstitutional. The Supreme Court

upheld the act's constitutionality, stating:

> "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. As we said in Camfield v. United States, 167 U.S., at 526, in response to a somewhat different claim: 'A different rule would place the public domain of the United States completely at the mercy of state legislation.'" (Kleppe v. New Mexico, supra, 426 U.S. at 543 (citations omitted).)

New Mexico has argued for a narrow reading of the Property Clause, contending that the clause provided an independent basis of congressional jurisdiction only for acts concerning the disposition of federal property or incidental rules regarding its use and for acts necessary to protect federal lands. The Supreme Court stated in response that "we reject appellees' narrow reading of the Property Clause," and later continued that "while the furthest reaches of the power granted

by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" (Id. at 537 and 539.) In light of Kleppe, the renewed attempt to restrict the scope of congressional power under the Property Clause in the present case is legally frivolous.

Ventura next contends that even if Congress had the power to enact overriding legislation, there is no evidence of either a congressional intent to preempt local regulation or a conflict between local and federal law that can be resolved only by exclusion of local jurisdiction. We need not consider the extent to which local regulation of any aspect of oil exploration and extraction upon federal lands is precluded by federal legislation; the local ordinances impermissibly conflict with the Mineral Lands Leasing Act of 1920 and on this basis alone they cannot be applied to Gulf.

The extensive regulation of oil exploration and drilling under the

Mineral Leasing Act is evident from the present record. The basic lease assigned to Gulf in 1974 contains approximately 45 paragraphs including requirements of diligence and protection of the environment as well as reservation of a one-eighth royalty interest in the United States. Because the lands lie within a National Forest, the lease requires Gulf's acceptance of additional Department of Agriculture conditions designed to combat the environmental hazards normally incident to mining operations. Specific drilling permits were also required from the Department of the Interior, Geological Survey, and the Department of Agriculture, Forest Service. The Geological Survey, which has formalized its procedures in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 et seq.), approved the proposed drilling on February 25, 1976, subject to 10 conditions which assure continued and detailed supervision of Gulf's activities. And on March 8, and April 15,

1976, the Forest Service issued a drilling permit subject to conditions focusing upon protection of the National Forest. Finally, Gulf is subject to the extensive regulations governing oil and gas leasing (43 C.F.R., Part 3100) and both sub-surface and surface operations (30 C.F.R., Part 221) promulgated by the Secretary of the Interior under his authority "to prescribe necessary and proper rules and regulations to do any and all things necessary to carry out and accomplish the purposes" of the act. (30 U.S.C. § 189.) And since the lease concerns lands within a National Forest, Secretary of Agriculture regulations governing oil and gas development are also applicable. (36 C.F.R., Part 252.)

Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at

all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

The present conflict is no less direct than that in Kleppe v. New Mexico, supra. Like Kleppe, our case involves a power struggle between local and federal governments concerning appropriate use of the public lands. That the New Mexico Authorities wished to engage in activity that Congress prohibited, while the Ventura authorities wish to regulate conduct which Congress has authorized is a distinction without a legal difference.

Relying upon Huron Portland Cement Co. v. Detroit (1960) 362 U.S. 440, Ventura argues that this conclusion is unjustified because, unlike Kleppe, the present conflict has not ripened. (See also Askew v. American Waterways Operators (1973) 411 U.S. 325.) In Huron, the Court allowed application of a local smoke abatement ordinance to a vessel

whose equipment had been federally licensed only because it concluded "that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved."[3/] (Huron, supra, at 446.) Ventura prefers the Court's observation: "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal legislation where none clearly exists." (Id. at 446.) It argues that since Gulf has never applied for a use permit, an adjudication of preemption is in conflict with Huron. We disagree. This argument ignores the very relief that Ventura sought when it asked to enjoin Gulf's operations. Ventura cannot bring an action seeking immediate recognition and implementation of its veto power over the Government's lessee, and successfully contend that an adverse ruling would require "seeking out conflict" unnecessarily. The issue is whether Ventura has the power of ultimate control over the Government's lessee, and

this issue persists whether or not a use permit would eventually be granted.

Federal Power Commission v. Oregon (1955) 349 U.S. 435, presented a similar question. In that case, the Federal Power Commission issued a license to construct and operate a private hydro-electric plan on reserved lands of the United States. The license included permission to construct a dam across the Deschutes River. Oregon challenged the exclusive jurisdiction of the Commission, and contended that the licensee must acquire a state as well as a federal permit. The Court held that the Commission's jurisdiction over the reserved lands of the United States was proper under the Property Clause, and that this jurisdiction was exclusive: "To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. 328 U.S. 152, 177-179. No such duplication of authority is called for by the Act." (Id. at 445. See Federal Power Act, 16 U.S.C. §§ 791a-825r.)

Ventura attempts to distinguish Federal Power Commission v. Oregon on the basis of reservations of local jurisdiction contained in sections 30 and 32 of the Mineral Lands Leasing Act (30 U.S.C. §§ 187, 189).[4/] It contends that although preemption was perhaps appropriate in light of the narrow reservations of local jurisdiction in the Federal Power Act, a similar finding in the present case is unwarranted given the broad savings provisions contained in the Mineral Lands Leasing Act.

The proviso in § 187 provides that "[n]one of such provisions shall be in conflict with the laws of the states in which the leased property is situated." (30 U.S.C. § 187.) But, as Gulf points out, by the use of the language "such provisions," the proviso relates only to the provisions of the preceding sentence. These provisions relate to employment practices, prevention of undue waste and monopoly, and diligence requirements. There is no mention of land use planning controls. Moreover, the proviso assures only that the Secretary of the Interior shall observe state

standards in drafting the lease's terms. It is not a recognition of concurrent state jurisdiction.

Nor is the savings clause in § 189 of any avail. After delegating to the Secretary of the Interior broad authority to prescribe rules and regulations necessary to effect the purposes of the act, the section continues:

> "Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." (30 U.S.C. § 189.)

The proviso preserves to the states only "any rights which they may have." While this is an express recognition of the right of the states to tax activities of the Government's lessee pursuant to its lease (Oklahoma Tax Commission v. Texas Co. (1949) 336 U.S. 342), and has been relied upon in part to uphold forced pooling and well spacing of federal

mineral lessee operations (Texas Oil & Gas Corp. v. Phillips Petroleum Co. (W.D. Okla. 1967) 277 F. Supp. 366, 369, aff'd (10th Cir. 1969) 406 F.2d 1303, 1304), the proviso cannot give authority to the state which it does not already possess. Although state law may apply where it presents "no significant threat to any identifiable federal policy or interest" (Texas Oil & Gas Corp. v. Phillips Petroleum Co., supra, at 371), the states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands and the proviso of § 189 does not alter this principle.

Finally, we are reassured in the correctness of our decision by policy considerations implicitly reflected in the structure and operation of the Mineral Lands Leasing Act of 1920 and the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 et seq.). As Ventura recognized in filing its second amended complaint, the National Environmental Protection Act ("NEPA") and the

guidelines, regulations, and Executive Orders issued in pursuance of that act,[5/] mandate extensive federal consideration and federal-local cooperation concerning the local, environmental impact of federal action under the Mineral Lands Leasing Act. If federal officials fail to comply with these requirements, Ventura has a remedy against those officials.

Our decision does not mean that local interests will be unheard or unprotected. In rejecting a local veto power while simultaneously guarding local concerns under NEPA, local interests can be represented, the integrity of the federal leases and drilling permits reconciling national energy needs and local environmental interests can be protected, and the ultimate lessee will be responsible to a single master rather than conflicting authority.

Although we recognize that federal incursions upon the historic police power of the states are not to be found without good cause (see, e.g., Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230), we must affirm because "under

the circumstances of this particular case, [the local ordinances] stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Hines v. Davidowitz (1941) 312 U.S. 52, 67. Accord, Jones v. Rath Packing Co. (1977) 430 U.S. 519, 526.) "[W]here those state laws conflict . . . with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede." (Kleppe v. New Mexico, supra, at 543.)

AFFIRMED.

FOOTNOTES

1/ The district court initially dismissed the first and second counts of the second amended complaint; Ventura thereafter stipulated to dismissal of the remaining counts of the complaint. Thereafter, the district court dismissed the entire action.

2/ The Property Clause of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." (U.S. Const., Art. IV, § 3, cl.2.)

3/ It has been suggested that the Court was actually applying a balancing test and that because the state's interest in air quality protection was strong and only minimally impinged the federal regulatory scheme, the local ordinance was protected. (Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L.Rev. 623, 629 n.37 (1975).) A recent case apparently applied a flexible supremacy, balancing test. (Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware (1973) 414 U.S. 117.) However, the conflict in the present case strikes at the heart of the federal regulation. The Mineral Lands Leasing Act and extensive permit procedures are designed for the very purpose of

circumscribing the conditions under which the Government lessee will operate.

4/ Before its 1978 amendment, section 30 provided in pertinent part:

"Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provisions requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of

monopoly, and for the safeguarding of the public welfare. None of such provisions shall be in conflict with the laws of the states in which the leased property is situated."

Section 32 provides:

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

5/ See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.; Guidelines of the Council on Environmental Quality, 40 C.F.R., Part 1500; Executive Order Number 11514, 35 Fed. Reg. 4247, March 5, 1970.

F I L E D

Apr 7 - 1977

Clerk, U.S. District Court
Central District of California

By_____ Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VENTURA COUNTY, a political subdivision of the State of California, Plaintiff, vs. GULF OIL CORPORATION, et al., Defendants.	CV76-1723-ALS ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND DISMISSING THE FIRST AND SECOND COUNTS OF PLAINTIFF'S SECOND AMENDED COMPLAINT

On May 20, 1976, the plaintiff, Ventura County, filed a complaint in California Superior Court against defendant Gulf Oil Corporation ("Gulf Oil"), alleging that the defendant, in violation of Ventura County zoning ordinances, is conducting oil exploration and extraction

activities on property within the County which has been zoned as Open Space. Plaintiff seeks to enjoin defendant from further oil exploration on the property until Gulf Oil obtains an Open Space Use Permit as required by the County ordinances. In addition, Ventura County seeks a declaratory judgment that Gulf Oil's activities on the land are subject to the County's zoning ordinances.

On May 27, 1976, defendant Gulf Oil removed the action to this court, pursuant to 28 U.S.C. §1441, alleging that original federal jurisdiction of the action exists under 28 U.S.C. §§1331(a) and 1332. It would appear that original jurisdiction of the action exists under Title 28, United States Code, Section 1332, and, therefore, removal of the action to this court was proper.

After removal of the case, plaintiff moved for a temporary restraining order, which motion was denied on June 17, 1976. On August 4, 1976, pursuant to a stipulation of the parties and order of the court, plaintiff filed its Second Amended Complaint. The allegations in Counts

One and Two of the Second Amended Complaint parallel the allegations in plaintiff's original complaint. In addition, the complaint contains three new counts and adds the United States and various government officials as defendants to these new counts.

Plaintiff has moved for a Preliminary Injunction with respect to Counts One and Two of its Second Amended Complaint, and defendant Gulf Oil has filed a motion to dismiss the complaint. Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, the trial on the merits of Counts One and Two was advanced and consolidated with the hearing on these motions. The matter came on regularly for trial before the honorable Albert Lee Stephens, Jr. United States District Judge. The parties having submitted a stipulated statement of facts, no oral testimony was taken. Counsel were advised that if the court later determined that oral testimony would be helpful, the parties would be given an opportunity to present such testimony to the court. Having heard oral argument of

counsel, having reviewed all filed papers and documents and being fully advised, the court determines that oral testimony is not necessary and rules as follows:

The facts surrounding Counts One and Two of plaintiff's complaint are not disputed and may be stated as follows: On January 1, 1974, the United States Department of the Interior, Bureau of Land Management, leased certain real property, located within the boundaries of the Los Padres National Forest in Ventura County, to Marcia P. Lane for oil and gas development purposes. Marcia Lane subsequently transferred her interest in the property to Gulf Oil by an assignment which was approved by the United States Department of the Interior, effective April 1, 1974. On February 25, 1976, the United States Department of the Interior, Geological Survey, issued a permit to Gulf Oil to allow drilling of an oil well on the leased property. On March 8, 1976, and April 15, 1976, the United States Department of Agriculture, Forest Service, issued additional permissions regarding drilling, and on March 8, 1976, the

California Resources Agency, Division of Oil and Gas, issued a "Report on Proposed Operations No. P276-79" approving Gulf Oil's proposal to drill an oil well.

Since receiving the above-mentioned permits, Gulf Oil has been conducting activities related to oil exploration and extraction on the leased property and Gulf Oil intends to continue developing its present drilling site and other sites on the property.

At all times relevant and material to this action, the real property upon which Gulf Oil has been conducting its oil exploration and extraction activities has been zoned Open Space ("O-S") by ordinances of Ventura County. Under these ordinances, oil exploration and extraction activities are not permitted on O-S zoned real property unless an Open Space Use Permit is obtained from the Ventura County Planning Commission as provided in Ventura County Ordinance Code articles 25 and 43. By a letter dated May 5, 1976, Ventura County advised Gulf Oil that it would have to obtain an Open

Space Use Permit from the County in order to continue its oil drilling activities on the leased property. Gulf Oil has not yet applied for or obtained such a Permit. Because Gulf Oil has continued its oil exploration and extraction activities without complying with the County's zoning ordinances, the County filed the instant suit.

Gulf Oil's Motion to Dismiss Counts One and Two

Before reaching the merits of plaintiff's claims under Counts One and Two of its complaint, defendant Gulf Oil's Motion to Dismiss must be considered. Gulf Oil contends that the First and Second Counts of plaintiff's Second Amended Complaint must be dismissed pursuant to Rule 19(b) of the Federal Rules of Civil Procedure because the United States is an indispensable party to these Counts.

The question of whether a party is "indispensable" to an action, thereby requiring its dismissal, is governed by Rule 19, which provides in pertinent part as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff

but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed,,the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by

the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Whether a party is or is not deemed to be indispensable to an action under Rule 19 depends, in large part, on the particular facts of each case. Rule 19 requires a pragmatic analysis and directs the court to look into the practical effects a judgment may have upon the absent parties. Advisory Committee's Note, 39 F.R.D. 69, 90-93 (1966).

Based upon a review of the facts of the instant case, it would appear that the United States is a person to be joined "if feasible," under Rule 19(a). The property which is the subject of this litigation is located within a national forest and is owned by the United States government. The defendant Gulf Oil is presently conducting oil exploration and

extraction activities on the property pursuant to a lease from the United States Department of the Interior under which the United States has reserved a royalty interest in oil removed or sold from the leased lands.

The County seeks, through this action, to enjoin Gulf Oil from continuing its activities on the land unless and until Gulf Oil obtains an open space use permit. If a judgment were to be entered in favor of the plaintiff and an injunction against Gulf Oil were to issue, the defendant would be required to cease, at least temporarily, all oil exploration and extraction on the property. While such a judgment would not affect the United States' title in the subject property, an injunction against Gulf Oil from further drilling clearly would affect the royalty interest which the government has reserved in the lease. It would appear, therefore, that the United States claims an interest in the subject of the action and a disposition in its absence may impair or impede its ability to protect

that interest. Thus, under Rule 19(a)(2)(i), the United States should be joined if feasible.

Gulf Oil contends, however, that the United States cannot be joined because it has not consented to be sued in this type of action. Assuming that joinder of the United States is impossible because of sovereign immunity, it must next be determined, pursuant to Rule 19(b), whether "in equity and good conscience" the action should proceed in the absence of the United States or should be dismissed, the United States being regarded as indispensable. Rule 19 sets out four factors to be considered by the court in determining whether an action should be dismissed for nonjoinder. A consideration of these factors as they apply to the instant case leads to the conclusion that the action should not be dismissed. Of the four factors listed in Rule 19(b), two are particularly applicable.

One factor which Rule 19(b) directs the courts to consider is the extent to which prejudice to the absent person can be lessened or avoided. It would

appear that any prejudice the United States may have suffered by not being joined as a party in the instant action has been avoided or at least lessened by its being permitted to appear as amicus curiae. At the request of the United States Attorney, the United States was permitted to file an amicus curiae brief in the instant case on August 10, 1976, and at the trial on November 1, an Assistant United States Attorney was permitted to present the views of the United States in the form of oral argument. Thus, the position of the United States with respect to the claims raised by the plaintiff in its first two counts has been thoroughly briefed and argued and is before the court.

Another factor to be considered by the courts is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. It would appear that a dismissal of this action for failure to join the United States as a party would leave the plaintiff without a remedy, there being no alternative forum within which the plaintiff could litigate its claims.

Based upon the above considerations, it appears that the prejudice which would be suffered by the plaintiff if the action were dismissed far outweighs any prejudice which might be suffered by the United States if the action is allowed to proceed in its absence. Since the equities clearly weigh in favor of the plaintiff, the action should not be dismissed for failure to join the United States as a party.

Plaintiff's Motion for a Preliminary Injunction and Trial on the Merits

There has been some dispute as to the exact nature of the issue to be decided in this case. In Counts One and Two of its Second Amended Complaint, the plaintiff requests the court to rule that in conducting its oil exploration and extraction activities on land leased from the federal government, Gulf Oil must comply with the County's zoning ordinances. It would appear, therefore, that to formulate the issue raised by the first two counts of plaintiff's complaint, the zoning ordinances which Ventura County is seeking to have

applied to Gulf Oil's activities and the effect of their application must be considered.

The ordinances which are the subject of this lawsuit are found in Articles 25 and 43 of the Ventura County Ordinance Code. In sum, they provide that oil exploration and extraction activities are not permitted on real property zoned Open Space unless an Open Space Use Permit has been obtained from the Ventura County Planning Commission. To obtain a use permit, an application must be filed with the Planning Commission. The Commission then has the power to grant a permit for such time and upon such conditions and limitations as it deems necessary, or it may deny the issuance of a permit. What we are dealing with, therefore, is an attempt by the County not merely to regulate Gulf Oil's activities on federal land but to prohibit those activities pending the approval of a permit.

If it were adjudged that Gulf Oil's activities are subject to the above zoning ordinances, Gulf Oil necessarily

would be required to cease all oil exploration and extraction activities. The cessation of its drilling might be permanent or only temporary, depending upon whether Gulf Oil ever applied for a permit or, even assuming it did apply, whether the Planning Commission ever granted such a permit. It would appear, therefore, that the precise issue raised by the instant action may be stated as follows: Whether the County of Ventura can, through its zoning ordinances, prohibit Gulf Oil, either temporarily or permanently, from using land which Gulf has leased from the federal government in a manner authorized by permits already obtained by Gulf Oil from federal agencies. The issue appears to be one of first impression.

Defendant Gulf Oil contends that the County's zoning ordinances are not applicable to Gulf's activities on federal land for the following reasons: 1) the doctrine of sovereign immunity prohibits the plaintiff from enforcing its zoning laws against Gulf; 2) the Supremacy Clause precludes plaintiff from enforcing its ordinances against Gulf;

and 3) subjecting federal oil and gas leases to County zoning jursidiction would thwart the National Energy Policy.

Gulf Oil contends that it is an instrumentality or agent of the federal government by virtue of its lease with the United States, and as such, it enjoys immunity from Ventura County's zoning ordinances. It would appear, however, that a private lessee under the Federal Mineral Leasing Act has no "instrumentality" status and, therefore, Gulf Oil cannot claim the protection of sovereign immunity. See Oklahoma Tax Comm'n vs. Texas Co., 336 U.S. 342 (1949).

Gulf Oil also asserts, however, that the County's zoning ordinances, which require Gulf to obtain a permit prior to drilling, conflict with provisions of the Federal Mineral Leasing Act of 1920 (30 U.S.C. §181 et seq.) and that the application of these ordinances to Gulf Oil's activities would substantially interfere with a federal policy and interest. It is Gulf Oil's contention, therefore, that under the Supremacy Clause of the Constitution, the County

cannot enforce these zoning ordinances against Gulf Oil.

California retains civil and criminal jurisdiction over the Los Padres National Forest notwithstanding the fact that the forest is owned by the federal government. 16 U.S.C. §480; See also United States vs. County of Fresno, ___ U.S. ___, 45 U.S.L.W. 4131, 4132 (January 25, 1977). While the State retains jurisdiction over these federal lands, Congress retains the power to enact legislation respecting these lands pursuant to the Property Clause and any legislation so enacted necessarily overrides conflicting State laws under the Supremacy Clause. See Kleppe vs. New Mexico, 426 U.S. 529, 543 (1976). Therefore, the extent to which Congress has exercised its power under the Property Clause with respect to federal lands which have been leased by the Government for oil and gas mining purposes, must be determined in order to ascertain the applicability of the zoning ordinances at issue in the instant case.

In 1920, Congress enacted the Mineral Lands Leasing Act ("Act") (30 U.S.C.

§181 et seq.). This Act provides for the leasing of lands owned by the United States, including national forests, for oil and gas development purposes. The Act sets forth in detail, among other things, the manner in which an oil and gas lease may be granted, the rents and royalties on production to be paid the government, and numerous conditions and limitations on the activities of the lessee under the lease. (30 U.S.C. §221 et seq.) Gulf Oil's lease was granted pursuant to this Act and defendant is subject to the provisions of that Act and to all rules and regulations of the Secretary of the Interior promulgated thereunder (Exhibit A of Plaintiff's Second Amended Complaint).

A principal purpose of the Act is "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." See Harvey vs. Udall, 384 F.2d 883, 885 (10th Cir. 1967). The purpose of the Act takes on added importance today, in view of the shortage of domestic reserves of oil and gas. As early as 1960, the

importance of public lands as a source for gas and oil was recognized. In recommending that certain revisions of the Act be made, the Committee on Interior and Insular Affairs noted that there had been a "potentially dangerous slackening in exploration for development of domestic reserves of oil and gas." It was the Committee's belief, at that time, that the proposed revisions to the Act would "remove certain legislative obstacles to exploration for development of the mineral resources of the public lands and spur greater activity for increasing our domestic reserve." 1960 U.S. Cong. and Adm. News, Vol. 2, 86th Cong. 3314-15.

In view of the clear federal policy, codified in the Mineral Leasing Act, of developing oil and gas deposits on public lands, it does not appear that the County of Ventura can, consistent with the Supremacy Clause, require a private lessee of federal land to obtain a use permit before it can engage in oil exploration and extraction pursuant to a federal oil and gas lease. The imposition of such a permit requirement

would, as a practical matter, have the effect of overriding the decision by the federal government to grant the lease. Such a requirement would interfere with the leasing activities of the federal government under the Act and with the government's policy of encouraging the development of ~~oil and gas~~.

In addition, if Gulf Oil were ordered to comply with Ventura County's open space permit requirements, the federal government's royalty interest in oil production would be threatened as Gulf Oil would be required to cease its operations until a permit was obtained.

In arguing that its zoning ordinances do not conflict with the provisions or policy of the Mineral Leasing Act, the plaintiff relies principally on the case of Texas Oil and Gas Corp. vs. Phillips Petroleum Co., 277 F. Supp. 366 (W.D. Okla. 1967) aff'd 406 F.2d 1303 (10th Cir. 1969) cert. denied 396 U.S. 829. Since the facts of Texas Oil and Gas are somewhat similar to the facts of the instant case, it deserves special consideration.

In Texas Oil and Gas, the plaintiffs owned oil and gas leases on federal lands situated in Oklahoma. The federal government executed these leases pursuant to the Mineral Leasing Act. The Corporation Commission of the State of Oklahoma issued an order by which the Tonkawa formation underlying these leases was forced pooled and pursuant to this order the working interests under the leases as to the Tonkawa formation were then owned by the defendant Phillips Petroleum. The plaintiffs asserted that this forced pooling order of the Oklahoma Corporation Commission was void as to their working interests in the formation because the lands involved belong to the United States and that by virtue of the Property Clause of the Constitution and the provisions of the Mineral Leasing Act, exclusive control over these lands resides in the United States government.

After reviewing the Mineral Leasing Act and the rules and regulations promulgated thereunder, the district court determined that "[n]othing in these cited statutes (nor the entire Act itself)

specifically indicates that Congress has undertaken to reserve unto itself exclusive control over federal lands leased for oil and gas development to the exclusion of the States." Id. at 369. Therefore, the court held that the forced pooling Order was valid and applied to the federal lands leased by the plaintiff. The court reached this conclusion, however, only after it determined that the application of the pooling Order to federal lands would not present a significant threat to any identifiable federal policy or interest. Id. at 371. It is this finding which distinguishes Texas Oil and Gas from the instant case. Application of the zoning ordinances to the federal land being leased by Gulf Oil would, as discussed supra, present a significant threat to an identifiable federal policy and interest. It is for this reason that the County's ordinances cannot constitutionally be applied. The Supremacy Clause of the Constitution precludes the plaintiff from enforcing against Gulf Oil zoning ordinances which allow the County to prohibit Gulf Oil

from conducting oil exploration and extraction activities on federal land.

Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion for a Preliminary Injunction is DENIED and Counts One and Two of Plaintiff's Second Amended Complaint are dismissed.

DATED: April 7, 1977

/s/ ALBERT LEE STEPHENS, JR.
United States District Judge

R E C E I V E D
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

AUG 30, 1979

DOCKETED 8/30/79
Date

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VENTURA COUNTY,	)	Civil Action
	)	
Appellant,	)	Nos. 77-2319 and
	)	77-2716
v.	)	(Consolidated)
	)	
GULF OIL CORPORATION,	)	
	)	
Appellee.	)	
	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ventura County, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of

the United States Court of Appeals for the Ninth Circuit, affirming the denial of appellant's motion for a preliminary injunction and the dismissal of appellant's second amended complaint, entered in this action on August 3, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DOROTHY L. SCHECHTER, County Counsel, County of Ventura, State of California

By _____
R. THOMAS HARRIS
Assistant County Counsel

Counsel for Appellant
Ventura County

UNITED STATES CONSTITUTION

Article IV, § 3, Clause 2

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

UNITED STATES CONSTITUTION

Article VI, Clause 2

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

16 U.S.C. § 480

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

16 U.S.C. § 551a

"The Secretary of Agriculture, in connection with the administration and regulation of the use and occupancy of the national forests and national grasslands, is authorized to cooperate with any State or political subdivision thereof, on lands which are within or part of any unit of the national forest system, in the enforcement or supervision of the laws or ordinances of a State or subdivision thereof. Such cooperation may include the reimbursement of a State or its subdivision for expenditures incurred in connection with activities on national forest system lands. This section shall not deprive any State or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system."

". . . Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any child under the age of sixteen in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare. None of such provisions shall be in conflict with the laws of the State in which the leased property is situated."

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

VENTURA COUNTY ORDINANCE CODE

GENERAL PROVISIONS [partial reproduction]

Sec. 12 - Severability - If any section, sentence, clause, phrase or portion of this Code is for any reason held to be invalid or unconstitutional by the decision of any court, such decision shall not affect the validity of the remaining portion of the Code. The Board [of Supervisors] would have adopted this Code and each section, sentence, clause, phrase, and portions thereof, irrespective of the fact that any one or more sections, sentences, clauses, phrases or portions be invalid or unconstitutional.

VENTURA COUNTY ORDINANCE CODE
DIVISION 8
CHAPTER 1 - ZONING
ARTICLE 1 [partial reproduction]

Sec. 8111 - PURPOSE OF CHAPTER - The text and zoning maps in this Chapter constitute the comprehensive zoning plan and regulations for the unincorporated area of the County of Ventura and are adopted to protect and promote the public health, safety, morals and welfare, and to provide the economic and social advantages which result from an orderly, planned use of land resources. Such regulations are designed and intended to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote

health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision for transportation, water, sewerage, schools, parks, roads, and other public facilities and improvements; and to establish the most beneficial and convenient relationships among the residential, commercial, industrial, agricultural, recreational, and undeveloped areas, having regard to their suitability for the various uses appropriate to each of them and their potentiality for such uses, as indicated by existing conditions and trends in population, in the direction and manner of the uses of land, in building development, and in economic activity.

VENTURA COUNTY ORDINANCE CODE
DIVISION 8
CHAPTER 1 - ZONING
ARTICLE 25 [partial reproduction]
OPEN SPACE (O-S) ZONE

Sec. 8143-1 - Purpose and Intent - It is the intent of this chapter to provide for the preservation, maintenance and enhancement of valuable natural, environmental and recreational resources while permitting reasonable and compatible uses of land. In order to properly manage these resources, criteria and regulations must be formulated to guide uses in the following open space capacities as defined in the Open

Space Element: productive, protective, structural, recreational and scenic preservation. The purpose and intent of this chapter shall be the advancement of the following objectives:

Sec. 8143-1.1 - To assure the continued availability of agricultural land for the production of food and fiber;

Sec. 8143-1.2 - To protect and preserve land areas for the managed production of natural resources;

Sec. 8143-1.3 - To protect, maintain and enhance watershed management to assure a continuing supply of safe water;

Sec. 8143-1.4 - To protect, maintain and enhance air quality;

Sec. 8143-1.5 - To maintain and promote the historical and cultural heritage of the county;

Sec. 8143-1.6 - To promote the health, safety, and welfare of all citizens of the county, through the protective management of hazard areas;

Sec. 8143-1.7 - To shape and guide urban development through open space management;

Sec. 8143-1.8 - To assure the continued availability of open space

lands for the enjoyment of outdoor recreation;

Sec. 8143-1.9 - To preserve and enhance areas of significant scenic amenity, unique natural features, and areas for educational and scientific research;

Sec. 8143-1.10 - To maintain and enhance land areas necessary for the continued survival of valuable wildlife and vegetation;

Sec. 8143-1.11 - To implement the conservation and open space elements of the General Plan;

Sec. 8143-1.12 - To seek coordination of open space lands with the incorporated cities of the county;

Sec. 8143-1.13 - To promote the multiple use of open space lands for the maximum social, economic and ecological benefit to the general public;

Sec. 8143-1.14 - To promote a wide range of land use options for future generations.

Sec. 8143-6 - <u>Uses Subject to Approval by the Planning Commission</u>. The following uses may be permitted subject to staff review and the approval of an Open Space User Permit by the Planning Commission:

Sec. 8143-6.2 - Oil exploration and extraction;

VENTURA COUNTY ORDINANCE CODE
DIVISION 8
CHAPTER 1 - ZONING
ARTICLE 43 [partial reproduction]
VARIANCES AND PERMITS

Sec. 8163-3 - Permits - Permits authorized by this Chapter are granted by the Planning Commission for such time and upon such conditions and limitations it deems necessary

Sec. 8163-3.1 - To assure that the degree of compatibility of property uses which this Chapter is intended to promote and preserve shall be maintained with respect to the particular use or the particular site and consideration of existing and potential uses of property within the zone and the general area in which use is proposed to be located;

Sec. 8163-3.2 - To assure that the proper performance standards and conditions are, whenever necessary, imposed upon uses which are, or which reasonably may be expected to become, obnoxious, dangerous, offensive or injurious to the health, safety or welfare of the public, or a portion thereof, by reason of the emission of noise, smoke, dust, fumes, vibration,

odor, or other harmful or annoying substances;

Sec. 8163-3.3 - To preserve the integrity and character of the zone in which the use will be located, the utility and value of property in the zone and adjacent zones, and the integrity of zones in incorporated areas if the proposed use is within the sphere of interest of such incorporated area;

Sec. 8163-3.4 - To assure that the use will not be or become detrimental to the public interest, health, safety, convenience, or the general welfare.

Sec. 8163-14 - Special Conditions for Oil and Gas Permits Heretofore and Hereafter Issued - It is declared to be in the interest of the public health, safety, welfare and purpose and intent of this Chapter that the following conditions shall be and they are hereby automatically imposed and made a part of any permit for oil and gas drilling and extraction hereafter issued and as to any permit issued prior to November 30, 1961, shall apply to any drilling or other activity commenced after November 30, 1961:

Sec. 8163-14.1 - Soundproofing - Whenever the drilling or redrilling of any oil or gas well commenced after November 30, 1961, is situated within five hundred

(500) feet of any dwelling not owned by the permittee, or if applicable, the lessor of the permittee, the derrick portable rig and machinery or equipment used to operate in connection with drilling, shall be enclosed with fire resistant and soundproofing materials; unless the Planning Director is furnished written consent to waive such condition by all owners and tenants of said dwellings. If a noise nuisance develops after written consent has been given and if inspection under supervision of the Planning Director sustains the noise level consitutes a nuisance, the original provisions of soundproofing will prevail. Whenever drilling is by portable drilling rig and will be accomplished and said rig removed within a thirty (30) day period, soundproofing requirements shall not apply;

Sec. 8163-14.2 - That the exercise of any right granted by the permit shall conform in all respects to the regulations and requirements of the California State Regional Water Pollution Control Board No. 4; and that all water, mud, oil, or any other substances removed as waste material from the land for which the permit is issued shall be deposited in a disposal site approved by the Planning Commission and the California State Regional Water Pollution Control Board;

Sec. 8143-14.3 - That no earthen sump shall be constructed or maintained within five hundred (500) feet, and no drilling shall be permitted within one hundred (100) feet of any natural channel in which there is or may be flowing water;

Sec. 8163-14.4 - That within ninety (90) days after a well is producing, the derrick, all boilers and all other drilling equipment shall be removed from the premises unless permission to store them on the premises is obtained from the Planning Commission;

Sec. 8163-14.5 - That all sumps, or debris basins, or any depressions, ravines, gullies, barrancas or the like which are used for the impounding or depositing of water, mud, oil, or any other fluid, semi-fluid, or any combination thereof, shall be fenced. When any such place is located more than one-half (1/2) mile away from any school, playground or dwelling, it shall be enclosed by a cattle fence with wood or steel posts not less than four (4) feet above the ground with not less than three (3) strands of barb wire secured horizontally to posts. When any such place is located within one-half (1/2) mile of any school, playground or dwelling it shall be enclosed by a wire fence of a wire mesh type with a minimum of two (2) inches by four (4) inches

opening and said fence shall be secured to steel posts not less than five (5) feet in height above the ground and said posts shall have forty-five degree (45°) arms attached to tope of posts with three (3) strands of barb wire attached thereto;

Sec. 8163-14.6 - That no permanent buildings or structures shall be erected within one hundred (100) feet of boundaries or right of way of any public street or highway;

Sec. 8163-14.7 - That the permittee shall at all times comply with the provisions of the Public Resources Code of the State of California, relating to the protection of underground water supply and in connection with oil and gas extraction;

Sec. 8163-14.8 - That upon abandonment of any well or cessation of drilling operations, all earthen sumps or other depressions containing drilling mud, oil or other waste products from the drilling operation shall be cleaned up by removing such waste products or by consolidating all mud, oil, or other waste products into the land by disking, harrowing and leveling to restore the land to the condition existing prior to the issuance of this permit as nearly as practicable so to do;

Sec. 8163-14.9 - Transfer of Permit. Unless otherwise provided in the terms of a permit, the permit shall expire no later than when the permitee's ownership, lease or other right to develop the property in the manner described in the application is terminated. A permit may be transferred to another person only with the approval of the Planning Commission. A transfer shall be null and void unless and until (a) the Planning Commission has approved the transfer, (b) the Planning Commission has been furnished satisfactory evidence of the transfer (c) the transferee files with the Planning Commission a writing wherein he obligates himself to comply with every term and condition of the permit, and (d) the transferee has filed an approved bond;

Sec. 8163-14.10 - That no drilling or other uses for which this permit is granted shall be commenced or continued unless and until permittee has filed, and the Planning Commission has accepted, a bond in the penal amount of twenty-five hundred (2500.00) for each well that is drilled or to be drilled. Any operator may, in lieu of filing such bond for each well drilled, redrilled, produced or maintained, file a bond in the penal amount of ten thousand dollars ($10,000.00) to cover all operations conducted in the County

of Ventura, a political subdivision of the State of California, conditioned upon the permittee well and truly obeying, fulfilling and performing each and every term and provision in the permit, and that in case of any failure by the permittee to perform or comply with any term or provision thereof, the Planning Commission may, by resolution, declare the bond forfeited and the sureties and principal will be jointly and severally obligated to pay forthwith the full amount of the bond to the County of Ventura. The forfeiture of any bond shall not insulate the permittee from liability in excess of the sum of the bond for damages or injury or expense or liability suffered by the County of Ventura from any breach by permittee of any term or condition of said permit or of any applicable ordinance or of this bond. The transfer of this permit, as provided for in Section 8163-14.9, Ventura County Ordinance Code, shall not be effective unless and until the transferree has also complied with this condition for posting an approved bond;

Sec. 8163-14.11 - That all drilling and production operations shall be conducted in such a manner as to eliminate, as far as practicable, dust, noise, vibration or noxious odors, and shall be in accordance with the best accepted practices incident to drilling for and the production

of oil, gas and other hydrocarbon substances. Where economically feasible, generally accepted and used tehnological improvements for reducing factors of nuisance and annoyance shall be employed by permittee.

F I L E D

JUN 2, 1976

Clerk, U.S. District Court
Central District of California
_____Deputy

DOROTHY L. SCHECHTER
County Counsel
R. THOMAS HARRIS
Assistant County Counsel
501 Poli Street
Ventura, California 93001
Telephone: (805) 648-6131

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

VENTURA COUNTY, a political subdivision of the State of California, Plaintiff, vs. GULF OIL CORPORATION, and DOES I through XXX, inclusive, Defendants.	No. 76-1723 (ALS) DECLARATION OF JOSEPH C. NESBITT

I, JOSEPH C. NESBITT, state and declare:

. . .

For approximately eleven years (1955-1966), I served as a member of the Ventura County Planning Commission. During my period of service on the Planning Commission, Ventura County routinely required and obtained compliance with its zoning ordinances by private parties engaging in land use activities on federally owned lands within the Los Padres National Forest.

. . .

Executed at Ventura, California, on June 2nd, 1976.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Joseph C. Nesbitt
JOSEPH C. NESBITT

Subscribed and sworn to before me

June 2, 1976
(Date)

/s/Mattie L. Brown
Notary Public in and for the County of Ventura, State of California.

OFFICIAL SEAL
MATTIE L. BROWN
NOTARY PUBLIC - CALIFORNIA
Ventura County

My comm. expires
APR 11, 1980
948 E. Main St.,
Santa Paula, CA
93060

F I L E D

MAY 26, 1976

ROBERT L. HAMM, County Clerk
By /s/ BETTINA JUE
Deputy County Clerk

DOROTHY L. SCHECHTER
County Counsel
R. THOMAS HARRIS
Assistant County Counsel
501 Poli Street
Ventura, California 93001
Telephone: (805) 648-6131

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

VENTURA COUNTY, a political subdivision of the State of California,	No. 60932
Plaintiff,	DECLARATION OF DON SPERLING
vs.	Hearing Date: May 28, 1976
GULF OIL CORPORATION, and DOES I through XXX, inclusive,	
Defendants.	

I, DON SPERLING, state and declare:

I am employed as an Associate Planner in the Planning Division of the

Ventura County Environmental Resource Agency.

For approximately the past seven years, my duties have included the processing of conditional use permits for the County of Ventura. During that time, I have never had a member of the U. S. Forest Service, the U. S. Geological Survey or the U. S. Bureau of Land Management dispute the County of Ventura's authority to require conditional use permits of private operators exploring for oil on public lands. In practice, the personnel of these federal agencies have been most cooperative in supplying information to assist the County in the processing of such conditional use permit applications and have suggested conditions which the County might impose to protect the interests of private property owners in the vicinity of federal lands leased for oil exploration (such as conditions prohibiting the excessive emanation of dust on access roads).

Ventura County conditional use permit records in my possession indicate

that at least 13 conditional use permits for oil exploration by private operators on lands within the Los Padres National Forest have been granted by Ventura County within the past ten years. Additionally, the records show that at least one such application is currently being processed. The conditional use permits have covered the following applicants and lands:

No. 1:

File No.: CUP 3533

Issued: (Filed 7-5-75)

Applicant: T. F. Johnson

Assessor's Parcel No.: 8-150-01

Section, Township & Range: Sec. 28, T4N, R24W, SBB&M

(U. S. Forest Service personnel are currently working with Ventura County staff in the preparation of an EIR for another application (CUP 3532) near the subject site on the Laguna Ranch.)

No. 2:

File No.: CUP 3585

Issued: 12-18-75

Applicant: W. K. Barker

Assessor's Parcel No.: 55-100-02

Section, Township & Range: Sec. 22, T4N, R19W, SBB&M

(Mr. D. F. Russell of the U. S. Geological Survey and U.S. Ranger Art Carroll worked with Ventura County staff in processing of the subject application.)

No. 3:

File No.: CUP 3470

Issued: 11-6-75

Applicant: Argo Petroleum Corp.

Assessor's Parcel No.: 55-010-08

Section, Township & Range: Sec. 3, T4N, R19W, SBB&M

(The surface rights of the Hopper Ranch were purchased by the U. S. Government on 12-18-74. On 10-3-75, Mr. Donald J. Hankla, Acting Regional Director of the U. S. Fish and Wildlife Service, requested that Ventura County impose certain restrictions on drilling operations in the County's Conditional Use Permit and this was done by the Ventura County Planning Commission.)

No. 4:

File No.: CUP 3413

Issued: 12-6-74

Applicant: Supreme Oil & Gas Corp.

Assessor's Parcel No.: 1-230-07

Section, Township & Range: Sec. 19, T8N, R23W, SBB&M

(U. S. Ranger T. G. Zrelak, U. S. Forest Service, submitted 13 pages of comments and recommendations to the County's staff for consideration during the County's processing of the subject conditional use permit application.)

No. 5:

File No.: CUP 3071

Issued: 5-21-69

Applicant: Getty Oil Co.

Assessor's Parcel No.: 8-150-05

Section, Township & Range: Sec. 27, T4N, R24W, SBB&M

No. 6:

File No.: CUP 3028

Issued: 12-4-68

Applicant: Spectrum Oil Co.

Assessor's Parcel No.: 15-010-01

Section, Township & Range: Sec. 6, T5N, R22W, SBB&M

No. 7:

File No.: CUP 3029

Issued: 12-4-68

Applicant: Spectrum Oil Company

Assessor's Parcel No.: 15-020-01

Section, Township & Range: Sec. 3, T5N, R22W, SBB&M

No. 8:

File No.: SUP 2869

Issued: 10-4-67

Applicant: Imperial Oil & Gas Ltd.

Assessor's Parcel No.: 16-130-13

Section, Township & Range: Sec. 33, T5N, R19W, SBB&M

No. 9:

File No.: SUP 2829

Issued: 7-19-67

Applicant: Anza Pacific Corp.

Assessor's Parcel No.: 16-130-04

Section, Township & Range: Sec. 28, T5N, R19W, SBB&M

No. 10:

File No.: SUP 2794

Issued: 6-21-67

Applicant: Argo Petroleum Corp.

Assessor's Parcel No.: 16-130-01

Section, Township & Range: Sec. 30, T5N, R19W, SBB&M

No. 11:

File No.: SUP 2608

Issued: 8-3-66

Applicant: S. E. Madar

Assessor's Parcel No.: Numerous Parcels

Section, Township & Range: Numerous sections, including some in T8N, R22W, SBB&M and T9N, R22W, SBB&M

No. 12:

File No.: SUP 2421

Issued: 10-20-65

Applicant: Spectrum Oil Co.

Assessor's Parcel No.: 6-180-02

Section, Township & Range: Sec. 26, T6N, R22W, SBB&M

No. 13:

File No.: SUP 2565

Issued: 10-5-66

Applicant: Spectrum Oil Co.

Assessor's Parcel No.: 15-060-08

Section, Township & Range: Sec. 23, T5N, R2W, SBB&M

No. 14:

File No.: SUP 2317

Issued: 6-7-65

Applicant: Eastern Interior Oil Comp.

Assessor's Parcel No.: 16-170-01

Section, Township & Range: Sec. 18, T5N, R18W, SBB&M

Processing of recent conditional use permits for oil extraction in the general vicinity of Gulf Oil Corporation's drilling site has revealed a large and widespread public interest in the impact of such activities on the environment and neighboring residences. For example, in hearings before the Ventura County Planning Commission and Board of Supervisors which I attended regarding CUP No. 3543 (oil exploration by Phoenix West Oil and Gas Corp.) within the past four months, approximately 60 persons expressed concern, either personally or through petitions,

regarding impacts on the environment, on Koenigstein Road, and on neighboring residences. Phoenix West's proposed activities under CUP 3543 are located in the vicinity of Koenigstein Road, approximately two miles from Gulf Oil Corporation's present drilling site.

Executed at Ventura, California, on May 25, 1976.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ DON SPERLING
DON SPERLING

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. ROBERT L. HAMM, County Clerk of the County of Ventura, State of California, and ex officio Clerk of the Superior Court therein.

Dated: May 27, 1976

(SEAL)

By /s/ Anna M. Martinez
Deputy County Clerk

Supreme Court, U. S.
FILED
DEC 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-664

VENTURA COUNTY,

Appellant,

vs.

GULF OIL CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

MOTION TO AFFIRM.

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IN THE

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VENTURA COUNTY,

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GULF OIL CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

MOTION TO AFFIRM.

Statement.

This is a direct appeal from a decision of the Ninth Circuit Court of Appeals entered August 3, 1979,[1] which affirmed an order of the District Court for the Central District of California, dated April 7, 1977.

[1]The Court of Appeals' opinion is reported at 601 F.2d 1080 (9th Cir. 1979) (advance citation) and is set forth at pages 1-20 of the Appendix to appellant's Jurisdictional Statement.

The case involves the applicability of a county zoning ordinance to federal forest lands under lease for oil and gas development. Ventura County (appellant) seeks to prohibit the federal government's lessee (appellee Gulf Oil) from developing the oil and gas reserves until the lessee complies with the County's land use permit system. The prohibition will be temporary if the permit is granted and permanent if the permit is denied. The County permit process consists of environmental analyses, public hearings and appeals which duplicate the extensive permit procedures of the responsible federal agencies. The lessee received all federal permissions and directives and proceeded to drill for oil in the federal forest. The question is whether the County can enjoin further development by the federal government's lessee until the County decides whether and on what conditions to give its permission.

The District Court found that application of the zoning ordinance to the federal lands leased by Gulf would present a significant threat to identifiable federal interests, namely encouraging the development of oil and gas on the public lands of the United States. The Court of Appeals upheld the District Court because the "local ordinances impermissibly conflict with congressional regulation of Gulf's activities on government land" (601 F.2d at 1082; Appendix at 2) and because "the local ordinances stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 601 F.2d at 1086; Appendix at 17.

ARGUMENT.

The decision below is so obviously correct as to warrant no further review. State interference with Congressional use of federal lands has never been allowed by this Court or any other federal court.[2] It matters not whether Congress chooses to accomplish its purposes directly or through the use of private persons. As noted by the Court of Appeals, a similar State attempt to assert dual regulatory authority over a federally permitted project by a private company on federal lands was turned aside in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1954) (*See* discussion at 601 F.2d at 1085; Appendix at 12), and, most recently, in *Kleppe v. New Mexico*, 426 U.S. 520 (1976), this Court blocked State interference with the Congressionally authorized use of federal lands stating that "a different rule would place the public domain of the United States completely at the mercy of state legislation." 426 U.S. at 543; *see* discussion

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[2]None of the federal cases cited by appellant involved any interference with federal interests. The state taxation at issue in *Mid-Northern Oil Co. v. Montana*, 268 U.S. 45 (1925); *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949); *Wilson v. Cook*, 327 U.S. 474 (1946), and *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (9th Cir. 1974), did not hinder or delay the authorized use of federal lands. In *Texas Oil and Gas Corp. v. Phillips*, 277 F.Supp. 366 (W.D. Okla. 1967), aff'd., 506 F.2d 1303 (10th Cir. 1969), cert. denied, 396 U.S. 829 (1969), the Tenth Circuit allowed a forced pooling order by the Oklahoma Corporation Commission to apply to a federal lease where there was "no significant threat to any identifiable federal policy or interest." 506 F.2d at 1306. The District Court had found that federal authorities specifically approved the forced pooling order and that the order would not adversely affect the federal royalty interest. 277 F.Supp. at 371. By contrast, in the present case there is no federal approval of the County action and the federal interest will either be delayed or terminated through enforcement of the county zoning ordinance.

at 601 F.2d 1083; Appendix at 5-7; *see also Hancock v. Train* 426 U.S. 167, 179 (1976) (denouncing State regulation of "federal installations and activities" except when and to the extent there is a clear and unambiguous Congressional mandate).

Contrary to the County's suggestion, the decision below will not place local residents living near federal lands at the mercy of an insensitive federal bureaucracy. Congress has provided for an extensive scheme of federal regulation (*see* summary at 601 F.2d at 1083-84; Appendix at 7-9) and has mandated under the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*, and other statutes,[3] that federal officials duly consider local interests and co-operate with local governments in making use of federal lands. Congress and the Courts have provided a potent remedy under NEPA if federal officials fail to discharge this responsibility. For reasons unexplained, the County in the District Court voluntarily dismissed its NEPA complaint against the federal officials who conducted the environmental analysis and approved Gulf's drilling permit.[4]

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[3]By the October, 1976 enactment of the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744 [codified at 43 U.S.C.A. §§1701 *et seq.* (Supp. 1977)] and the National Forest Management Act, Pub. L. No. 94-558, 90 Stat. 2949 [codified at 16 U.S.C.A. §§1600 *et seq.* (Supp. 1977)], Congress reaffirmed its preeminent power and interest in regulating the use of federal lands but required federal agencies to co-operate with local governments and invite public participation in the development of land use plans. 43 U.S.C.A. §1712(c)(9); 16 U.S.C.A. §§1612 and 1643(c).

[4]The record shows that before approving Gulf's drilling permit the forest service contacted Ventura County planning officials and obtained the list of 56 conditions which the County had imposed on another oil company drilling outside the forest but in the same general vicinity. Over a year had elapsed in the processing of that county permit including a number of public hearings and appeals.

Conclusion.

The dual system of land use regulation asserted by Ventura County would subordinate lands and energy resources which belong to all the people of the United States to local wishes which may not always reflect national needs. Congress has sought to balance the competing interests through an extensive regulatory framework which makes substantial provision for local concerns without sacrificing national objectives. The County proposal would upset this balance. It would delay the federal royalty interest, adversely affect the marketability of federal oil and gas leases and subject Congressional efforts to secure energy independence to a patchwork of local regulation and prior restraints.

We respectfully submit that appellant presents no substantial question for the consideration of this Court and that the decision of the Court of Appeals should be affirmed without further review.

Respectfully submitted,

WILLIAM V. KASTLER,
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Supreme Court, U. S.
FILED
MAR 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-664

In the Supreme Court of the United States

OCTOBER TERM, 1979

VENTURA COUNTY, APPELLANT

v.

GULF OIL CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-664

VENTURA COUNTY, APPELLANT

v.

GULF OIL CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of January 7, 1980.

STATEMENT

On January 1, 1974, an oil and gas lease was issued by the Department of the Interior under the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*, to Marcia P. Lane. The lease embraced 120 acres of federally-owned land in the Los Padres National Forest in Ventura County, California. Three months later, the lease was assigned to the Gulf Oil Corporation.

In early 1976, Gulf obtained drilling permits in respect of the leased area from the United States Department of the Interior and the Forest Service in the Department of Agriculture and shortly thereafter commenced to drill. In

May 1976, Ventura County brought this action to enjoin Gulf from drilling and exploring for oil on the property until it obtains an Open Space Use Permit as required by the County zoning ordinance. The United States was named as a party to the action, but was subsequently dismissed. However, both in the district court and in the court of appeals, the United States participated as amicus curiae, and argued that the County ordinance did not apply to operations undertaken pursuant to the federally issued oil and gas lease.

The District Court for the Central District of California held that requiring Gulf to obtain a use permit from the County before it could engage in oil exploration and extraction pursuant to a federal oil and gas lease would have the effect of overriding the decision by the federal government to grant the lease, and would thus violate the Supremacy Clause (J.S. App. A-39 to A-40). The court of appeals affirmed and, primarily on the basis of *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976), held that since "the federal Government has authorized a specific use of federal lands, * * * Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress" (J.S. App. A-10).

ARGUMENT

In our view, the decision below is plainly correct and should be summarily affirmed.

1. Appellant no longer appears seriously to challenge the constitutional power of Congress to pre-empt local regulation of mineral activities on federal lands. At all events, we believe any such argument is foreclosed by this Court's decision in *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976), reaffirming the very broad congressional authority

under the Property Clause over the public domain—even though the area is not a "federal enclave" otherwise within exclusive federal jurisdiction—and the corollary that conflicting State or local regulation must give way under the Supremacy Clause.

Here, as there, it is no objection to the exercise of congressional power that the rule enacted is challenged as creating a potential "nuisance" adversely affecting neighboring lands, or as interfering with otherwise legitimate State or local regulation. See, also, *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955). Whatever the limits of the Property Clause, the federal scheme involved in this case cannot be said to ride roughshod over State or local prerogatives or the rights of other property owners. On the contrary, the licensed activities are carefully controlled to protect local concerns and environmental values. All that is claimed is the power to exploit federally-owned property under substantial safeguards without subjecting the operation to a local "veto" "by requiring the [County's] additional permission." *Federal Power Commission* v. *Oregon*, *supra*, 349 U.S. at 445.

We conclude that there is no arguable constitutional issue and turn to the only other question: whether the relevant federal statute in fact pre-empts the provisions of the Ventura County ordinance at issue here.

2. The Mineral Lands Leasing Act of 1920 and the regulations promulgated thereunder comprise an unusually comprehensive and detailed scheme for the exploitation of federally-owned oil and gas resources. Almost no aspect of leasing, exploration, or extraction of the minerals is left unregulated. In the present situation, special drilling permits are required from both the Bureau of Land

Management and the Forest Service. This is, we submit, one of those instances in which "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States [or local authorities] to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted with approval in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). What is more, with respect to the orderly exploitation of vital resources in the public domain, it reasonably may be supposed that the Congress meant to retain in federal hands the implementation of a national policy, unencumbered by any local veto power. Yet, at the end of the day, what the County asserts is a right to prohibit drilling. Unless some provision of the Mineral Leasing Act can be read as expressly subjecting oil and gas exploitation on federal lands to local control, that result must be deemed foreclosed.

In our view, the court of appeals correctly disposed of the contention that the proviso in Section 32 of the Mineral Leasing Act, 30 U.S.C. 189, governs this case. Whatever the scope of that very vague provision in respect of matters other than taxation, it cannot reasonably be construed to require further local approval of a specific permit to drill an oil well on federal lands. That proposition would go much too far in defeating the federal scheme. If Congress had meant to require drilling permits to be submitted to State or local authorities before operations, it surely would have said so more unambiguously.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

DOJ-1980-03

Supreme Court, U. S.
FILED
DEC 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-664

VENTURA COUNTY,
Appellant,
v.
THE GULF OIL CORPORATION,
Appellee.

BRIEF AMICUS CURIAE OF THE WESTERN GOVERNORS' POLICY OFFICE (WESTPO) IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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CONSENT OF PARTIES

Consents of both parties (Appellant and Appellee) to the filing of this Amicus Brief have been obtained. Letters from counsel for both parties indicating this consent have been filed with the Clerk of the Supreme Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-664

VENTURA COUNTY,
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v.

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Appellee

On Appeal from the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE WESTERN GOVERNORS' POLICY OFFICE (WESTPO) IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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STATEMENT OF INTEREST OF AMICUS

The Western Governors' Policy Office (WESTPO) is an instrumentality of ten States (Alaska, Arizona, Colorado, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming). WESTPO's members are the Governors of those ten states, and the ten member Governors constitute WESTPO's Board of Directors.

WESTPO was organized in non-profit corporate form by the member Governors during the September, 1977 annual meeting of the Western States' Governors in Anchorage, Alaska, for exclusively governmental purposes, to provide an instrument for state policy management and vehicle for collective expression and influence with respect to important regional, interstate, and federal-state issues.

The member State Governors, who constitute WESTPO's Board of Directors, regard the issues involved in this present case as among the most substantial and urgent of current issues affecting their respective States, even though the case arises out of a non-WESTPO State. This is the first judicial matter in which the WESTPO Governors have sought collectively to assert their States' common interest - - a fact which emphasizes the cardinal importance of this case.

The decision below profoundly unsettles long established governmental practices with regard to approximately one-half the total combined land area of the WESTPO States. Federally owned public lands comprise ninety-five percent of the land area of Alaska; sixty-six percent of Utah; forty-eight percent of Wyoming; forty-five percent of Arizona; thirty-six percent of Colorado; thirty-four percent of New Mexico; thirty percent of Montana; and lesser proportions of North Dakota, South Dakota, and Nebraska. A great majority of this vast federal estate is administered by the Bureau of Land Management (BLM) of the Department of the Interior. The decison below places a novel and unprecedented interpretation upon a fifty-nine year old statute administered by BLM, the Mineral Lands Leasing Act of 1920, to hold that traditional and essential state and local powers of government are preempted with regard to private activities on the public lands.

ARGUMENT

I

Ventura County had not attempted to influence or affect federal government activities. The appellee in this case is Gulf Oil Corporation,

and the issues presented on the appeal involve only private activities taking place on federal public lands. The decision below radically curtails traditional state power to secure the public interest, just at the time when burgeoning private development of public land resources is giving new urgency to that long established state and local role.

Both the language and the legislative history of the Mineral Lands Leasing Act of 1920 and its subsequent amendments strongly negate any preemptive intent on the part of Congress. In the absence of any express or fairly implied preemptive intent by Congress, the public land States have traditionally exercised their powers as Ventura County sought to do in this case, to preserve the public interest with regard to private users of the public land just as they do with regard to users of private land. This pattern of long established practice, which indeed has constitutional foundations, ought not to be disrupted upon the novel interpretation of a two generation-old statute never given such construction before. At least it ought not to be so disrupted without plenary and careful consideration by this Court.

II

The decision below is also at odds with the comprehensively considered

policy recommendations of the Public Land Law Review Commission, which was created by Congress in 1964, PL 88-606, 78 Stat 982. The Commission and its broadly representative staff and Advisory Council studied federal public land policy for five years at Congress' direction, before presenting its final report to Congress in 1970. Among the Commission's final policy recommendations was the following:

> "Recommendation No. 13: State and local governments should be given an effective role in Federal agency land use planning. Federal land use plans should be developed in consultation with these governments, circulated to them for comment, and should conform to state and local zoning to the maximum extent feasible. As a general rule, no use of public land should be permitted which is prohibited by state or local zoning."

Public Land Law Review Commission Report, ONE THIRD OF THE NATION'S LAND at 61 (1970).

III.

Appellant's statement of the Questions Presented on this appeal also raises a constitutional issue concerning the relative scope of state and federal legislative jurisdiction over the

federal public lands. It is scarcely possible to overstate the significance of this issue to the public land States in the West.

In 1976, this Court decided Kleppe v. New Mexico, 426 US 529. There were several sound legal rationales available to the Court on which that decision could appropriately have been based. The Court chose to base the decision, however, on a view of the Property Clause (U. S. Const., Art. IV, §3, Cl.2) and the Supremacy Clause (U.S. Const., Art., VI, Cl.2) which had the effect, apparently inadvertent and unperceived by this Court, of revolutionizing a seldom litigated and until now relatively obscure branch of constitutional law.

With all genuine respect, the WESTPO Governors and their States believe the constitutional rationale in Kleppe was profoundly and demonstrably in error. The correction of that error is important to resolution of the present Ventura County case and is of paramount urgency to the WESTPO States.

The Kleppe decision would produce little mischief if it were confined to its facts and to the narrow statement of its holding expressed by this Court, namely, that "the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding," 426 U.S. at 546-547. As the opinion of the Court of Appeals herein illustrates, however, lower courts are giving the Kleppe decision far more

sweeping effect, with consequences for State jurisdiction surely never contemplated by this Court.

Constitutional doctrine concerning legislative jurisdiction over the federal public lands is an exceedingly complicated and easily misunderstood branch of constitutional law. The easy assumption that the Property Clause confers a general legislative power over the public domain, no different for Supremacy Clause purposes from the other enumerated powers, reflects a woeful misapprehension of the precedents and of the fundamental constitutional reasoning on which those precedents are based.

Shortly after the first states containing large tracts of federally owned land were admitted into the Union, this Court reached the conclusion that the Property Clause carries a different meaning for federal lands within the boundaries of States than it does for unincorporated territories. While the facts in Mayor of New Orleans v. United States, 35 U.S. (10Pet.) 662 (1836) and Pollard v. Hagan, 44 U.S. (3How.) 212 (1845) involved only so-called "common" lands (such as river bottoms and tidelands), the rationale of those cases was that to acknowledge a general federal legislative jurisdiction over the lands within States to which the United States retained title would subvert the doctrine of enumerated federal powers. Certainly

Congress as sovereign legislator could exercise on that land all the legislative powers enumerated in Article I and elsewhere in the Constitution, including the Necessary and Proper Clause; but the Property Clause itself was held to confer over this federal property only a Congressionally exercisable administrative power, not the legislative power of a sovereign.

For that reason it was held that the Property Clause power over private uses on federal land could validly be delegated to administrative officials in general and unspecific terms, United States v. Grimaud 220 U.S. 506, 515-516 (1911); United States v. Midwest Oil Co., 236 U.S. 459, 474-475 (1915), even at a time when this Court was enforcing stringent restrictions (long since abandoned) against the delegation of legislative power, e.g. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). For that reason also this Court held that a federal administrator's exercise of the Property Clause authority expressly delegated to him by the Act of January 26, 1915, cl.19, §4, 38 Stat. 800 (codified, as amended, 16 U.S.C. § 195) could not override State law governing private activities in Rocky Mountain National Park at a time when that Park was federal property under the Property Clause but not yet a "federal enclave" under U.S. Const., Art. I, §8, cl. 17. Colorado v. Toll, 268 U.S. 228 (1925).

Congress certainly had extensive legislative powers over the public domain, powers derived from the constitutional grants equally applicable throughout the United States; and those powers were considerable, and were and are ample to effectuate all of the United State's sovereign concerns. The additional power as to federal public lands within States conferred by the Property Clause, however, was well understood to be the administative power of a property owner, not the legislative power of a sovereign; and hence, to that power the Supremacy Clause (which is written in terms of legislative powers) was held not to apply.

There were refinements of these principles, and narrow exceptions which developed for specific historical and policy reasons apparent when the cases are carefully studied; but the general principle remained unchanged in the jurisprudence of this Court until Kleppe v. New Mexico in 1976.

The opinion in Kleppe gives no indication that this Court perceived that it was changing the law. Certainly there was no indication of any policy consideration by this Court, nor any awareness of the profound implications of this change for the public land States, which since the nineteenth century have structured their polity in reliance upon the traditional rules.

At the time of deciding Kleppe, this Court lacked adequate guidance through the difficult and seldom litigated issues in this field. The first comprehensive scholarly study of Property Clause doctrine was not published until after the Kleppe decision, and it promptly became the standard reference in the field. Engdahl, State and Federal Power Over Federal Property, 18 Arizona Law Review 283 (1977), reprinted in 14 Public Land and Resources Law Digest 269 (1977). The article documents in meticulous detail not only the source and evolution of the constitutional rules in this field, but also the sources and subtleties of the con-conceptual errors which appear res-responsible for the ill-conceived constitutional rationale of the Kleppe decision.

Nevada, which is not a WESTPO state, seeing the constitutional basis of its sovereignty over eighty-six percent of its territory exploded by the rationale endorsed by this Court in Kleppe, has launched a widely publicised "Sagebrush Rebellion",[1]

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[1]Among the articles relating the "Sagebrush Rebellion" to the issues in the present case, see: "Sagebrush Rebellion Heads for Courts," Western Law Journal, vol. 1, no. 2, page 1 (Nov./Dec. 1979); "Sagebrush Rebels Eye Ventura County Lawsuit," Los Angeles Daily Journal, October 8, 1979, page

claiming title to much of the public domain in Nevada by an audacious legislative act, A.B. 413, effective July 1, 1979, as a means to restore the traditional legislative power that has been lost. The WESTPO Governors believe, however, that it is not necessary to infringe upon the administrative prerogatives of the federal government as a landowner conferred by the Property Clause as to federal lands within States. They consider it better advised to rely upon the distinctions traditionally drawn in constitutional doctrine between federal administrative powers deriving from ownership (although exercised by Congress in legislative form), and the legislative powers of the United States as a sovereign, conferred by constitutional provisions other than the Property Clause.

1; see also cover story, "The Angry West," and article, "Sagebrush Revolt," in Newsweek, Sept. 17, 1979, pages 38-39; "Western Officials Devise Strategy to Get U.S. Land," Los Angeles Times, September 7, 1979, page 6; "10 States Endorse Sagebrush Rebellion," Reno Evening Gazette, July 30, 1979, p. 7; "Nevada Trying to Reclaim Land Held by Government Since 1864," New York Times, June 10, 1979, section 1, page 50.

Since it was enacted at a time, in 1920, when the administrative and non-legislative constitutional character of enactments under the Property Clause was well understood, and since it does not purport to rest upon any other constitutional federal power, it would be remarkable if one could discover any evidence of congressional intention to preempt state or local legislative jurisdiction by the enactment of the Mineral Lands Leasing Act. Indeed, several provisions of the Act (e.g., 30 U.S.C. §189) make it quite evident that Congress knew it was exercising only its non-legislative powers as the landowner, and disavowed any attempt to deny or interfere with any legislative power state or local authorities might exercise under their respective constitutional and statutory provisions. Even if one could find - - as the Court below did not - - some fair indication that Congress had intended such arrogation of legislative power, the constitutional rule repeatedly reaffirmed since Pollard v. Hagan, supra, in 1845, and applied forcefully again in Colorado v. Toll, supra, just five years after the Mineral Lands Leasing Act was enacted, would have precluded it. That is the constitutional rule which escaped even the barest recognition of this Court in Kleppe, where the confusion over the precedents was doubtless compounded by the arguments of counsel concerning unfounded notions of "exclusive" power.

Consequently, these governors most earnestly urge this Court to open the constitutional rationale of Kleppe v. New Mexico to a sober and reflective reexamination in light of the vital policy considerations and comprehensive constitutional scholarship that can now be placed before the Court.

> "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examinaton and the test of experience."

Field, J., for the Court in Barden v. Northern Pacific Railroad Co., 154 U.S. 288, at 322 (1894).

Four terms ago this Court acknowledged its prior overlooking of the traditional rule of intergovernmental immunities, and overruled in National League of Cities v. Usery, 426 U.S. 833 (1976), the error it had made only eight years before in Maryland v. Wirtz, 392 U.S. 183 (1968). A short time earlier, an unfounded "second rationale" for an otherwise well grounded decision, endorsed by all of the Justices in Katzenbach v. Morgan, 384 U.S. 641, at 653-656 (1966), had been celebrated by commentators and utilized as the express and flaunted constitutional basis by congressional sponsors and supporters for enactment of the federal act lowering the voting age even for

state elections; but once the subtle errors of that second rationale were exposed, not one of the Justices endorsed the rationale to which all had subscribed only four years before, see Oregon v. Mitchell, 400 U.S. 112 (1970), and the article there cited at p. 142 n.7.

Fundamental constitutional issues of governmental structure are far too important to be controlled by a rigid stare decisis that makes the most recent error immutable law. "Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law." Rehnquist, J. for the Court in Edelman v. Jordan, 415 U.S. 651, at 671 (1974).

Conclusion

For the foregoing reasons, the Governors of the ten States of Alaska, Arizona, Colorado, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, organized as the Western Governors' Policy Office (WESTPO), earnestly urge this Court to take jurisdiction of the appeal in this case, and specifically to reach the constitutional issue of the nature of federal power based only upon the Property Clause of Article IV of the Constitution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-664

VENTURA COUNTY,

Appellant,

vs.

GULF OIL CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae in Support of Statement as to Jurisdiction.

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Brief Amicus Curiae in Support of Statement as to Jurisdiction.

QUESTIONS PRESENTED.

1. Whether a private entrepreneur operating on federal forest land pursuant to a federal lease is exempt from local regulation under a county zoning ordinance.

2. Whether Congress can preempt and has preempted local governments' historic zoning power over federally owned lands within their boundaries through the enactment of the Mineral Lands Leasing Act of 1920, 30 U.S.C. section 181-236.

INTEREST OF AMICI CURIAE.

The importance of the questions presented to this Court is attested to by the fact that the states of Idaho, Montana, Nevada, Utah and Wyoming have joined in California's decision to file an amicus brief in support of appellant Ventura County.

According to statistics, the federal government owns approximately more than 700 million acres of land in the Western states.[1] The State of California alone has within its boundaries eighteen national forests. In the States of California, Montana, Wyoming, Colorado, New Mexico, Arizona, Washington and Oregon the percentage of federally owned lands is between 25%-60%.[2] In the States of Idaho, Nevada and Utah the federal government owns more than 60% of the land. In Nevada alone the federal government owns 87% of the land.[3]

These lands contain large deposits of uranium, heavy crude oil, mountains of oil shale and a major portion of the country's low-sulfur coal reserves. The federal government through a number of energy programs has set upon a rapid acceleration of development of these bountiful reserves.

The adverse impacts resulting from development of these reserves will be borne almost exclusively by these local and state governments and their constituents. The impacts of rapid acceleration of resource development tend to remain localized and can be substantial. Oil exploration and development operations can create excessive noise, produce unwholesome and noxious odors, contaminate waters in natural channels and result in other conditions which threaten life, health and property. In addition, rapid acceleration of oil exploration and development may result in rapid population

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[1]One-third of the Nation's Land—A Report to the President and to the Congress, Public Land Law Review Commission (1970) pp. 324, 327-330.

[2]Public Land Statistics, 1975, Department of Interior.

[3]*Id.*

increases with its attendant problems and an overburdening of municipal services.

Thus, amici curiae have a substantial interest in the issue of local governments' regulation over federal lands located within their jurisdictions and urge this Court to clarify the authority of a local government to regulate oil exploration and extraction activities on federal forest lands.

The court below declared invalid Ventura County's zoning ordinance as applied to oil exploration and extraction activities of a federal lessee operating on federal forest land. The court declared the zoning ordinance invalid on preemption grounds characterizing the ordinance as a veto power and reasoning that such power impermissibly conflicted with federal goals and purposes. A proper development of the law requires that the questions posed by this case be answered. They are questions of first impression.

If the decision of the court below is permitted to stand, local governments will be precluded from regulating mineral exploration and extraction activities on federally owned lands within their jurisdiction. This result will be contrary to the legislative intent and legislative provisions of the Mineral Leasing Act of 1920, *supra*, and forest legislation acknowledging state jurisdiction upon national forests, 16 U.S.C. section 480.

Further, the court below has erroneously extended this Court's decision in *Kleppe v. New Mexico* (1976) 426 U.S. 529, to substantially different facts presented in the case at bar. These issues will be treated fully in the arguments that follow.

THE QUESTIONS ARE SUBSTANTIAL.

I

Ventura County Has Authority to Enforce Its Zoning Ordinance in Los Padres National Forest and Such Ordinance Is Consistent With Federal Environmental Policies.

Ventura County seeks to regulate Gulf Oil's exploration and extraction operations for oil in Los Padres National Forest through a local zoning ordinance designed to protect the health, welfare, and quality of environment for its residents. The zoning ordinance contains eleven requirements including provisions relating to soundproofing, waste disposal and discharge into streams.

The area comprising Los Padres National Forest was set aside as a national forest by Presidential Proclamations in 1898, 1899 and 1903. (30 Stat. 1767 (1898); 31 Stat. 1954 (1899); 33 Stat. 2327 (1903).) On December 3, 1936, President Franklin D. Roosevelt, by executive order, named the area Los Padres National Forest. (1 Fed.Reg. 2471 (1936). As a result of these Presidential Proclamations, Los Padres National Forest was reserved from entry or settlement and set aside as a public reservation.

Los Padres National Forest is held by the federal government in proprietorial status.[4] Lands in proprietorial status are lands in which the federal government has "acquired some right or title to an area in a state, but has not obtained any measure of the State's authority over the area."[5]

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[4]*Legislative Jurisdiction Over Federal Lands Within the States as of June 30, 1957,* at p. 111, General Services Administration, *Inventory Report on Jurisdictional Status of Federal Areas Within the States as of June 30, 1962.*

[5]*Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction*

Thus, federal ownership of the land alone does not preclude the application of local and state laws.

> "In an area owned by the Federal Government where there has been no cession of legislative jurisdiction on the part of the State government, all State Laws are applicable within the Federal area. Persons present on such land are subject to all State laws."[6]

The Court has more recently recognized in *Kleppe v. New Mexico* (1976) 426 U.S. 529, that in the absence of consent or cession a state retains jurisdiction over federal lands within its territory subject to Congressional power to legislate with respect to such property.

Additional authority acknowledging local jurisdiction is contained in legislation governing the creation of national forests:

> "The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as punishment of offenses against the United States therein is concerned; *the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction,* nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State." (16 U.S.C. § 480.) (Emphasis added.)

Over Federal Areas Within the States, Part II, a Text of the Law of Legislative Jurisdiction, Government Printing Office, 1957 at pp. 10-11; *United States v. Bateman,* (9th Cir. 1888) 34 Fed. 86, 89.

[6]*Id.* at p. 28. Also see *Omaechevarria v. Idaho* (1918) 246 U.S. 343 [38 S.Ct. 323, 62 L.Ed. 763].

Further, under 30 U.S.C. sections 187 and 189 Congress has expressly preserved the right of states and local governments to regulate with respect to certain matters. With respect to leases issued by the Secretary of the Interior Congress specifically provided in section 187 that

> "[n]one of such provisions shall be in conflict with the laws of the State in which the leased property is situated."

The provisions in section 189 delegate to the Secretary broad authority to prescribe rules and regulations and also contain the following savings clause:

> "Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

The court below reasoned that since these sections do not expressly authorize Ventura County to exercise land use powers, there is no grant of concurrent local jurisdiction. This analysis, however, ignores the status of Los Padres National Forest as a proprietary interest of the federal government. As previously mentioned, the federal government holds Los Padres in a proprietary capacity and as such acquired rights and title to the area, but it has not obtained any measure of the State's authority over the area.[7]

Thus the State retains all its legislative jurisdiction over the land, "subject to non-interference by the State

[7] *Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, supra.*

with Federal functions, and subject to the free exercise of the Federal Government of rights with respect to the use, protection and disposition of its property."[8]

The provisions of 30 U.S.C. sections 187 and 189 reinforce the rights of the States and local governments with respect to the express authority contained therein. These provisions cannot be construed so as to limit the rights of Ventura County to regulate solely the activities mentioned in sections 187 and 189. Indeed through the provisions in sections 187, 189 and 16 U.S.C. 480, Congress has clearly expressed its intent not to exclude non-federal legislation.

The Court of Appeals construed the zoning ordinances as a veto power and reasoned that the ordinance frustrated federal policy as set forth in the Mineral Leasing Act. However, as will be discussed in the next section, there is no evidence in the record to support such construction of the ordinance. Setting aside for the present the characterization of the ordiance as a veto power, the question is whether the ordinance frustrates a federal goal or policy under the Mineral Leasing Act of 1920. The Mineral Leasing Act of 1920 reflects a federal policy of encouraging domestic oil production. Notwithstanding this policy, there is no indication from Congress that this goal is paramount to other federal goals and policies. Indeed, by placing federal environmental protection measures upon oil operations under the Mineral Leasing Act, Congress has clearly identified another federal

[8] *Id.*, p. 45.

goal—requiring oil operations to comply with federal environmental protection measures such that our national forests are protected from destruction and degradation.[9] Since Congress has clearly expressed a policy of requiring oil operations under the Mineral Leasing Act to comply with federal environmental protection measures, does it follow that complementary local measures designed to further the same policy are preempted?

Amici submit that the zoning ordinance is consistent with federal policy on environmental protection measures for oil exploration and development under the Mineral Leasing Act of 1920 and, thus, the ordinance does not impermissibly frustrate federal goals encouraging energy development. We now turn to the question of whether the ordinance is otherwise preempted.

II

In Determining Whether the Local Zoning Ordinance Has Been Preempted, the Intent to Preempt Is Not to Be Implied Absent Actual Conflict.

The decision by the Court of Appeals to invalidate the zoning ordinance on the basis of preemption apparently rests on two grounds: first, that the existence of extensive federal regulations in the field impliedly has preempted the local ordinance, and second, that the requirement for a conditional use permit under the zoning ordinance constitutes a veto power of the federal government's decision to issue a lease and thus operates as an impediment to the accomplishment of a federal purpose or policy.

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[9]43 C.F.R., Part 3100, 30 C.F.R., Part 221.

It is generally said that courts will invalidate a local law on preemption grounds only where it is clear that Congress intended to occupy that specific area of local legislation.[10] This intent, however, need not be explicit. It may be inferred from a variety of factors. A number of tests for preemption have developed.

One test is whether the federal regulatory scheme may be so pervasive as to indicate that Congress intended to occupy the entire field leaving no room for state or local governments to act.[11] A second test is whether the federal legislation touches upon a field in which the overriding federal interest is so dominant that the federal statute may be presumed to preclude enforcement of non-federal law on the same subject matter.[12] A third standard is that if the non-federal law stands as an obstacle to or frustrates the accomplishments of the purposes and objectives of Congress, then the non-federal law is preempted by federal law.[13]

These tests notwithstanding, direct, irreconcilable conflict between the provisions of the non-federal and federal laws is the touchstone of preemption.[14] This

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[10]*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 229-230 [67 S.Ct. 1146, 91 L.Ed. 1447]; *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142 [83 S.Ct. 1210, 1217, 10 L.Ed.2d 248].

[11]*Guss v. Utah Labor Relations Board* (1957) 353 U.S. 1, 10-12 [77 S.Ct. 598, 609, 1 L.Ed.2d 601].

[12]*Hines v. Davidowitz* (1941) 312 U.S. 52, 67 [61 S.Ct. 399, 85 L.Ed. 581].

[13]*Rice v. Santa Fe Elevator Corp., supra; Chicago-Midwest Meat Ass'n. v. City of Evanston* (1978) 589 F.2d 278.

[14]*San Diego Unions v. Garmon* (1959) 359 U.S. 236, 250, concurring opinion. [79 S.Ct. 773, 3 L.Ed.2d 775]; *A. M. Motors Sales v. Div. of Motor Vehicles, etc.* (1979) 592 F.2d 219.

Court has rejected previously the notion "that pre-emption is to be inferred merely from the comprehensive character of the federal . . . provisions."[15]

In *New York Dept. of Social Services v. Dublino*, New York's social welfare law was challenged as pre-empted by the 1967 Federal Work Incentive Program provision of the Social Security Act. A three-judge District Court ruled the state law preempted. The Supreme Court reversed stating the general rule thus:

> " 'If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.' [Citations omitted.]"[16]

The Court rejected appellee's contention that the state work programs were preempted because of the comprehensive nature of the federal legislation. The Court then stated:

> "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem, cf. Askew v. American Waterways, 411 U.S. 325 (1973)."[17]
>
> ". . . It would be incongruous for Congress on the one hand to promote work opportunities for

[15]*New York Dept. of Social Services v. Dublino* (1973) 413 U.S. 405, 415, [93 S.Ct. (1973) 2507, 2513].

[16]*Id.*, pp. 413-414.

[17]*Id.*, p. 415.

> AFDC recipients and on the other to prevent States from undertaking supplementary efforts toward this very same end. We cannot interpret federal statutes to negate their own stated purposes."[18]

The Court analyzed the interrelationship of the state and federal efforts as follows:

> "New York, furthermore, has attempted to operate the Work Rules in such a manner as to avoid friction and overlap with WIN. . . . Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."[19]

The zoning ordinance in question would impose a number of operating conditions upon Gulf including, among others, requirements that the operations be sound-proofed, that waste material be deposited in a properly approved site, that no drilling be permitted within 100 feet of any natural water channel, and that all pumps and debris basin be fenced if located in close proximity to a school. These conditions are complementary to the federal regulations requiring environmental protection measures under the Mineral Leasing Act, *supra*. Indeed, the record in this case fails to show that an actual conflict exists between the local ordinance and the federal regulatory scheme. The pre-emption doctrine requires that such a conflict exists before the local ordinance may be preempted.

The leading case involving the invalidity of local regulation of a subject matter said to be occupied

[18]*Id.*, pp. 419-420.

[19]*Id.*, p. 421.

by federal law is *Huron Cement Co. v. Detroit* (1960) 362 U.S. 440.

The issue in that case was whether a municipality in the interests of air pollution reduction could regulate the emissions from boilers on a vessel in interstate commerce when those very vessels had been approved and licensed by the federal government. The Court upheld the city's action stating that:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations omitted.]"[20]

The Court stated the general rule concerning preemption and conflict:

> "In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation *is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field.* In other words, such intent is not to be implied unless the act of Congress fairly interpreted is

[20]*Id.*, p. 442.

> in *actual conflict with the law of the State.*' [Citations omitted.]"[21] (Emphasis added.)

In the present case there is no such actual conflict. The Court of Appeals reasoned that conflict did exist by characterizing the zoning ordinance as a veto power over the project. However, the Court ignored the County's showing that the Planning Commission had successfully applied the zoning ordinance to a number of private lessees in Los Padres National Forest.[22] This evidence indicates without question that Ventura County has issued approximately 13 permits within the last ten years for oil exploration by private operators in Los Padres National Forest.

It is Amici's position that the zoning ordinance in question does not present an actual conflict with federal law. The Planning Commission has neither construed the zoning ordinance to authorize prohibition of a permit to a federal lessee operating in Los Padres National Forest nor indicated an intent to so enforce the ordinance. The allegations in the pleadings and the proffered evidence must be considered. Nowhere in Gulf's pleadings does it appear that the Planning Commission is refusing or has indicated an intention to refuse to issue a permit. Nowhere is it alleged or shown that the Commission has so construed the statute or threatens to do so. The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for a finding of preemption, especially when it does not appear that the local regulation has ever been so con-

[21]*Id.*, at p. 443.

[22]See portion of record reprinted at pp. A-62 through A-72, App.

strued. *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325.

This Court has stressed that the question of preemption requires an analysis between the state and federal laws "not merely as they are written" but "as they are interpreted and applied."[23] Therefore, this Court should analyze the zoning ordinance as written, interpreted and applied. Such an exercise would clearly demonstrate the lack of conflict between the local and federal regulatory scheme.

The Court of Appeals also found the ordinance preempted on the basis that the injunctive relief sought by Ventura County to require compliance by Gulf operated as a veto over the federal lease and thus impermissibly conflicted with federal law. This reasoning, however, is in error because the finding of preemption is not based on the construction of the ordinance as written and applied. Rather, it is based on an extraneous factor—the nature of relief sought by Ventura County to require Gulf Oil to comply. Gulf Oil brought about the circumstances which required Ventura County to file an action to preserve and enforce its rights. To construe Ventura County's enforcement action as an attempt to exercise veto power over Gulf effectively rewards Gulf for not complying with local regulations and operates to limit the County to a declaratory relief action—an action that would not have adequately protected the County's interests.

Further, construing Ventura County's efforts to obtain compliance with its ordinance as tantamount to an exercise of a veto power over Gulf and finding

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[23]*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526 [97 S.Ct. 1305, 51 L.Ed.2d 604].

preemption on that basis is a serious departure from existing precedent on the preemption doctrine which has heretofore required an analysis of the particular regulation in question as written, interpreted and applied. Permitting a finding of preemption to rest on the nature of relief sought by a party would result in rather unclear legal principles. For example, in the instant case, if Ventura County had not initiated an action and Gulf Oil had instead filed an action for declaratory relief, the inquiry would have focused on the ordinance itself and its application. In such a context, the issue that the County sought a veto power through injunctive relief would not have surfaced.

The question of whether or not a particular local government is to be preempted from a field of regulation is of tremendous importance and, therefore, the doctrine of preemption should continue to rest on an analysis of the particular regulation challenged rather than on the vagaries of what party got to court first and the nature of the relief sought.

Further, the Court below has misapplied *Kleppe v. New Mexico, supra,* to Ventura County's zoning ordinance. For the reasons previously indicated herein, the Court has misconstrued the zoning ordinance as a veto power and has rested its analysis on the nature of the relief sought by Ventura County rather than on the nature of the ordinance itself. To so construe the ordinance is to create a conflict where none exists and ignore the ten-year history of the ordinance's successful application to other oil operations in Los Padres National Forest.

In *Kleppe v. New Mexico, supra,* the New Mexico Livestock Board acting pursuant to the State's Estray

Law entered upon the public domain, and removed a number of unbranded burros for subsequent sale. The Bureau of Land Management demanded the return of the burros under the Wild-Free-roaming Horses and Burros Act, 16 U.S.C. sections 1331-1340, enacted to protect wild horses and burros on public lands. New Mexico filed a declaratory relief action seeking a judgment that the federal act was unconstitutional. This Court upheld the constitutionality of the federal law.

The situation in *Kleppe* was different from the case at bar in one substantial respect—the state regulation in *Kleppe* by its terms and application actually conflicted with the federal law. The state regulation permitted conduct which the federal act prohibited. Such is not the case here, where the history of the application of the ordinance has not resulted in a conflict, where the ordinance complements federal environmental protection provisions, and where the ordinance has never been applied in a manner that conflicts with the applicable federal law.

CONCLUSION.

The court below has erroneously construed Ventura County's ordinance and its decision threatens to eliminate the authority of a local government to exercise its police powers on federal land. In the process of invalidating Ventura County's zoning ordinance, the court's holding threatens to disrupt the balance of local and federal authority in the regulation of oil

development on federal lands. For reasons set forth herein, this Court should note probable jurisdiction in this case to review the decision below.

Respectfully submitted,

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